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# REPORTS OF CASES

DECIDED IN THE

## COURT OF COMMON PLEAS

### UPPER CANADA

AND A SHORT HISTORY OF THE CASES, TO BE FOUND IN THE COURT OF COMMON PLEAS

BY

EDWARD G. JONES, Esq.

Attorney at Law

VOLUME 1

TORONTO:

JOSEPH ROWELL

1881



# REPORTS OF CASES

DECIDED IN THE

## COURT OF COMMON PLEAS

OF

### UPPER CANADA

FROM HILARY TERM, 23 VICTORIA, TO MICHAELMAS TERM, 24 VICTORIA.

BY

EDWARD C. JONES, ESQUIRE,

BARRISTER-AT-LAW.

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VOLUME X.

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TORONTO:  
HENRY ROWSELL.

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1861.

# REPORTS OF CASES

DECIDED IN THE

## COURT OF COMMON PLEAS

### UPPER CANADA

FROM HIS HONOUR THE JUDGE OF THE COURT OF COMMON PLEAS IN THE CITY OF TORONTO

Entered according to Act of Provincial Legislature, in the year of our Lord one thousand eight hundred and sixty-one, by EDWARD COURSOLES JONES, in the Office of the Registrar of the Province of Canada.

BY

EDWARD C. JONES, Esq.

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VOLUME 2

TORONTO:


HENRY ROWLAND

1861

JUDGES  
OF  
THE COURT OF COMMON PLEAS  
DURING THE PERIOD OF THESE REPORTS.

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The HON. WILLIAM HENRY DRAPER, C. J.  
„ „ WILLIAM BUEL RICHARDS, J.  
„ „ JOHN HAWKINS HAGARTY, J.



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REPORTS OF CASES

IN THE

COURT OF COMMON PLEAS.

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HILARY TERM, 23 VIC. (*Continued*).

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Present :—

The Hon. WILLIAM HENRY DRAPER, C.B., C. J.

„ „ WILLIAM BUEL RICHARDS, J.

„ „ JOHN HAWKINS HAGARTY, J.

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MIDDLEFIELD V. GOULD ET AL.

*Sureties—Division court clerk—How far liable to bailiff for fees collected by him.*

*Held* that the sureties of the clerk of the division court are responsible for moneys received by the clerk for bailiff's fees on actions brought in his court. And further, that entries made by such clerk in the course of his business in books kept, under the provision of an Act for that purpose, were evidence against the sureties in an action brought by a bailiff to recover such moneys.

ACTION on a covenant dated the 9th of May 1856, whereby defendants covenanted that one John L. Gould, clerk of the fourth division court of the county of Ontario, should duly pay over to the person entitled to the same all such moneys as he should receive by virtue of the said office of clerk, and would well and faithfully perform the duties imposed upon him as such clerk by law.

The breach assigned was, that the clerk improperly and unfaithfully performed the duties imposed upon him and misconducted himself in the said office to the injury of the

plaintiff in not paying over to the said plaintiff as bailiff of the said division court certain fees placed in his hands.

*Plea non est factum.*

2. That John L. Gould did pay over to plaintiff all moneys which he was entitled to receive, by virtue of his office, for plaintiff *absque hoc* that the said fees in the declaration mentioned were received by John L. Gould as such clerk, for the plaintiff, and were by him payable to the plaintiff; or that he was conducting himself as therein alleged; this latter part of the plea seemed obscure.

Issue was taken on the pleas.

At the trial before *Hagarty, J.*, at the last Whitby assizes, the execution of the covenant by defendants was proven, and the present clerk of the court stated that John L. Gould, the former clerk, in the book kept by him (the book in which the entries were made in relation to the proceedings in the court) entered a statement 11th January 1858, amount due bailiff (plaintiff) £40, as follows: "Settled with bailiff and balanced all costs up to this suit; amount due bailiff £40." There was an item in the court book, £24, 1s. 2d., which the clerk stated showed the fees due the bailiff for the court held on the 19th of February 1858, which was separate from the first balance; moneys had been paid plaintiff on account since, which reduced his claim to £46, 12s. 2d.

For the defence *McMichael* objected that the defendants were not liable for moneys received by the clerk for bailiff's fees.

2d. That the declarations or actions of the clerk were not sufficient evidence to warrant a finding against his sureties.

The verdict was given for the plaintiff for £46, 12s.

In Michaelmas Term *McMichael* moved for a new trial on the following grounds:—

1st. That the covenant sued on was not against the default complained of; and that the moneys belonging to the bailiff, though received by the clerk, could not be recovered from the defendants.

2d. For the admission of improper evidence in admitting

minutes in the book of the clerk (the principal) as evidence against defendants, being sureties ; and

3rd. On the ground that the verdict was contrary to law and evidence, the statement in the book not showing that the balance admitted was for the moneys mentioned in the covenant ; or

4th. Why judgment should not be arrested on the ground that it was not shown in the declaration with whom the defendants covenanted, or that they covenanted with the plaintiff.

In Hilary Term last *Richards*, Q.C., shewed cause, and contended that under the division court acts the clerks are authorised to receive fees of the bailiff, and therefore the covenant must apply to them. He argued that the entries made by the clerk in pursuance of his duty as a public officer and against his own interest must be evidence on the production of such entries. As to the ground for arrest of judgment, he wished leave to amend if the court thought there was anything in that. He referred to and distinguished this case from *Ferrie v. Jones*, 8 U. C. Q. B., 192 ; and *Municipality of Easthope v. Helmer et al.*, 7 U. C. C. P. 506, and to *Middleton v. Milton*, 10 B. & C. 317.

*McMichael*, contra, contended the covenant was only intended as a security for suitors, as the judge would have power in a summary way to punish any officer of his court for not paying over money to another officer. He further contended that the action against sureties was *strictissimi juris*, and before they could be charged it must be proved the money was paid. He further argued that the plaintiff's declaration was defective, and defendants entitled to move in arrest of judgment on the grounds suggested on moving the rule.

RICHARDS, J.—The form of the covenant is that the clerk shall duly pay over to the person entitled to the same all such moneys as he shall receive by virtue of his office, and will well and truly perform the duties imposed upon him as such clerk by law, and shall not misconduct himself in the said office to the damage of any person being a party in any legal proceeding.

Here, then, is a covenant that there shall be, 1st. No default in paying over money. 2nd. That there shall be no breach of duty on the part of the clerk; and 3rd. That he will not misconduct himself. And the 22nd. sec. of 13 & 14 Vic., ch. 53, says, the covenant "shall be available to, and may be sued upon, by any person suffering damages by the default, breach of duty, or misconduct of the officer." It is possible, as to misconduct, the remedy may, by the words of the covenant, be only given to suitors, for it says, "and shall not misconduct himself in the said office to the damage of any person being a party in any legal proceeding." I apprehend the misconduct referred to is something different from a default in paying over moneys.

Now, if he receives by law moneys for the fees of the bailiff, I do not see how his sureties can claim exemption from liability if he fails to pay these fees over to the person, if a bailiff, entitled to receive the same.

By section 13, amongst other things the clerk is required to keep an account of all *court fees* and fines payable or paid into court, and of all suitors' money paid into and out of court, and to enter an account of all such fees, fines, and moneys in a book to be kept by him for that purpose. Sec. 14 declares certain fees to be payable to clerks and bailiffs, and directs *the fees* on every proceeding shall be paid in the first instance by the plaintiff or defendant on or before such proceeding, and the bailiff's fees upon executions *shall be paid to the clerk of the court* at the time of the issue of the warrant of execution, *and shall be paid over by such clerk to the bailiff* upon the return of the warrant of execution and not before; provided, if the bailiff shall neglect to make a return within the time required by law of *any summons*, process, or execution, he *shall for each such neglect forfeit his fees* on such summons, process, or execution, and all *fees so forfeited shall be held to have been received* by the clerk of the court, and shall be *accounted for* and paid over to the county treasurer for the fee fund.

These sections, I think, clearly establish that some, if not all, of the fees of the bailiff are required to be paid into the hands of the clerk, and they are to be paid over by him to

the bailiff, or the fee fund, according as the former may be entitled to them or not.

The general doctrine established by a great number of cases is, that the verbal admissions or mere entries of a principal are not evidence against a surety. But where entries are made in the usual course of business by a principal against his own interest, and in discharge of his duty, such entries are evidence *after his death* in an action against his sureties. The case of *Whitnash et al. v. George et al.*, 8 B. & C. 556, was an action upon a bond given to bankers, conditioned for the fidelity of a clerk, and it was held that entries of the receipt of sums of money made by the clerk in books kept by him in discharge of his duty as clerk were after his death evidence against his sureties of the fact of the receipt of the money. In moving for a nonsuit in that case *Merewether*, Sergeant, referred to the case of *Goss v Watlington*, 3 Brod. & Bing. 132, where, in an action against a surety who had entered into a joint bond with his principal on his appointment to a *public* office, conditioned for payment of all moneys received, and further, that he should from time to time enter in certain books all moneys received by him, such entries by the principal were after his death evidence against the surety. The learned Sergeant, in reference to that case, observed that the decision proceeded on the ground that the books were public books.

*Bayly*, J., in reference to *Goss v. Watlington* said, "The foundation of that decision was, that the entries made by the collector were admissible not merely as a declaration made by him against his interest, but on the ground that they were entries in those very books which by the condition of the bond the principal was bound faithfully to keep. The entries were evidence against the surety, because they were made by the collector in pursuance of the stipulation contained in the condition of the bond."

The case referred to, *Middleton v. Milton* (10 B. & C. 317), was decided on the ground that entries of the receipt of moneys by a deceased collector in a private book of his own was evidence against his surety of the receipt of such moneys, on the general ground that such entries were against

his interest, and therefore receivable in evidence against a third person, whether such person was a surety or not.

In the case before us the entries were made by the clerk from day to day in the discharge of the duties of his office, and the statute under which he was appointed requires the making of such entries on general principle; therefore I am of opinion that entries so made can be received in evidence against the defendants. I think the book in which these entries were made comes fairly within the class of books referred to by Mr Taylor in his work on Evidence (second edition, sec. 1429), as kept by persons in a public office, in which they are required, whether by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties and under their personal observation.

I am, therefore, of opinion that these entries so made by the clerk are properly receivable in evidence against his sureties.

The evidence at the trial shewed an entry made by the clerk in the books of a settlement with the plaintiff up to a certain suit with a balance due plaintiff of £40. The witness does not say that the previous entries in the books shewed a receipt of moneys by the clerk for bailiff's fees to that amount, and as the mere statement of a balance due does not come within the rule, I think as to this balance the evidence fails.

|   |          |
|---|----------|
| There was evidence of payments on account of the £40, |          |
| which reduced it to .....                             | £22 11 0 |
| Then as to the balance of.....                        | 24 1 2   |

---

|  |          |
|--|----------|
| Constituting the amount of the verdict ..... | £46 12 2 |
|--|----------|

The witness examined on the trial stated that it shewed the fees due the bailiff for the court held on the 19th of February; as to this amount the verdict seems right and found on sufficient legal evidence.

If the plaintiff reduces his verdict to the £24, 1s. 2d., then the rule for a new trial will be discharged, and the plaintiff will have leave to amend his declaration to meet the objection urged that it does not shew plaintiff entitled to sue

on the covenant. If he thinks he can shew that the £22 11s. was properly entered in the books, and that they will furnish the necessary evidence to prove that amount, and he does not desire to have the verdict stand for the £24, 1s. 2d., then the rule will be absolute for a new trial, and as there does not appear to have been any leave reserved to defendant to move, the rule must be absolute without costs.

Rule absolute unless plaintiff elects to reduce his verdict.

### BANK OF MONTREAL V. SMART ET AL.

*Bill of Exchange—By railway company—How necessary to be drawn and accepted under 18 Vic. ch. 182.*

*Held* that a bill of exchange drawn and accepted by certain persons respectively signing themselves secretary and president of a railway company did not come within the 13th section of 18 Vic., ch. 182, as being accepted by the president and countersigned by the secretary; and

*Held*, also, that the parties so accepting and drawing were personally responsible.

The first count of the declaration was on a bill of exchange drawn by defendant Smart on defendant Macbeth, payable to the order of Messrs Ball & Carroll for \$400 and interest at three months after date, accepted by defendant Macbeth, and endorsed by Ball & Carroll to the plaintiffs. Averment of due presentment, dishonour, and notice.

Second count, on a bill similarly drawn, payable with interest at six months after date, in favour of B. & C., acceptance, indorsement, presentment, dishonour, and notice as before.

*Pleas* by Smart.—That he did not make or draw the bill *modo et formâ*; by Macbeth, that he did not accept *modo et formâ*.—Issue.

At the trial in October 1859, at Woodstock, before *Burns, J.*, it was admitted that both bills were drawn and accepted, for a debt due by the Niagara and Detroit Rivers Railway Company to the payees, by the consent of the board of directors. That the plaintiffs took these bills without knowledge of these facts, and before they fell due. The plaintiffs called one of the payees, who proved that he

heard the defendant Macbeth, the acceptor, made a statement before the board of directors. He (witness) understood the acceptor was a stockholder to the amount of £1000, and that a call had been made on the stock. A question then arose whether defendant had paid his stock, the call of £100, and defendant then said he allowed the £100 on account of the notes (the bills sued on). The board of directors allowed him to retain the amount of the £100 for his stock. Considered the £100 thus paid, and he was allowed to vote. The payees' account against the company was about £500, and they took bills for £400. A sum of £100 was checked out to the payees by the defendant (Macbeth). But the £100 allowed on the stock retained by defendant and allowed by the directors was for a second call of ten per cent. on defendant's stock.

The learned judge directed a verdict for plaintiff, and reserved leave to defendants to move to enter a verdict if the court should be of opinion that the plaintiffs could not maintain an action against the defendants in their individual capacity, and that, as these bills were drawn and accepted, the company alone were liable to the plaintiff, the verdict might be entered for one or both of the defendants.

The following is a copy of one of them :

“\$400.

No. 9.—Niagara and Detroit Rivers Railway Company, Hamilton, 1st February 1859. Three months after date pay to the order of Messrs Ball and Carroll, at the Bank of Montreal here, four hundred dollars, with interest thereon, for value received, and charge to account of

(Signed)

W. LYNN SMART,

Secretary of the N. & D. Rs. Ry. Co.

To GEORGE MACBETH, Esq.,

President, London, C. W.”

Across the face of the bill was written, “Accepted, Geo. Macbeth, President.”

The acceptance on the bill at six months was signed, “Geo. Macbeth, President.”

In Michaelmas Term *Becher*, Q.C., obtained a rule *nisi*

to enter a verdict for the defendants on the leave reserved.

In this term *Anderson* and *Crombie* shewed cause. They cited *Lindus v. Melrose*, 2 H. & N. 293, and 3 H. & N. 177; *Armour v. Gates*, 8 U. C. C. P. 548; *Leadbitter v. Farrow*, 5 M. & S. 345; *Balfour v. Ernest*, 5 Jur. N. S. 439; *Bank of Montreal v. DeLatre*, 5 U. C. Q. B. 362. They relied as to *Macbeth* on the fact that he retained the instalment called in upon his stock for the purpose of paying this note. This bill is not under the protection of 22 Vic., ch. 90.

*Becher*, Q. C., stated that the evidence of Ball, one of the payees, was erroneous, and asked to change his rule into one for new trial on payment of costs. He suggested that he (Ball) was interested, having guaranteed the payment of the notes to the plaintiffs. He contended that the signature of Smart might be treated as a countersigning as secretary, which, under 22nd Vic., ch. 90, is required. He also referred to *Lindus v. Melrose*, 18 Vic., ch. 182, sec. 13; 18 Vic., ch. 179, sec. 3; 22 Vic., ch. 118.

DRAPER, C. J.—The Woodstock and Lake Erie Railway and Harbour Company, and the Amherstburg and St. Thomas Railway Company, in pursuance of the powers contained in their charters and amended acts, executed a deed of amalgamation, dated the 11th of February 1858, and under the name of the Great South-Western Railway Company became united as one company. The statute 22 Vic., ch. 118, recites this fact, and confirms the deed of amalgamation, and (sec. 3) changes the name to “The Niagara and Detroit Rivers Railway Company.”

The Amherstburg and St. Thomas Railway Company was incorporated in 1855 by 18 Vic., ch. 182. The 13th section was as follows: “The said company shall have power to become parties to promissory notes and bills of exchange for sums not less than £25, and any such promissory note made or endorsed, and such bill of exchange drawn, accepted, or endorsed by the president or vice-president of the company, and countersigned by the secretary and treasurer, and under the authority of a majority of a quorum of the direc-

tors, shall be binding on the company; and every such promissory note or bill of exchange made, drawn, accepted, or endorsed by the president or vice-president of the said company, and countersigned by the secretary and treasurer as such, shall be presumed to have been properly made, drawn, accepted or endorsed, as the case may be, for the company, until the contrary be shewn, and in no case shall it be necessary to have the seal of the company affixed to any such bill of exchange or promissory note; nor shall the president, vice-president, or secretary and treasurer of the company, so making, drawing, accepting, or endorsing any such promissory note or bill of exchange, be thereby subjected individually to any liability whatever. Provided always, that nothing in this section shall be construed to authorise the said company to issue any note payable to bearer or any promissory note intended to be circulated as money or as the notes of a bank."

I do not find any similar provision in any other act affecting either of these two companies up to the passing of the 22nd Vic., ch. 118.

The deed of amalgamation is set out in this last act, and provides that the amalgamated or new company may exercise and enjoy all the rights, powers, &c., &c., which otherwise would appertain to the two companies if such amalgamation had not taken place.

All the acts affecting either of the two companies, as well as the last (22 Vic., ch. 118), are repealed by 22 Vic., ch. 90 (1859), and a new company is formed, though the preamble recites that the Niagara and Detroit Rivers Railway Company have prayed that the several acts relating to the incorporation of the said company should be amended and consolidated, and it is reasonable to grant the prayer. The new corporation, however, keep the name. The 16th section of this act is like the 13th section of 18 Vic., ch. 182. By the 35th section the new company shall assume and discharge all the debts, engagements, obligations and liabilities of the Amherstburg and St. Thomas Railway Company, the Woodstock and Lake Erie, &c., Co., the Great South-Western Railway Company, and the Niagara and Detroit Rivers

Railway Company. This act was passed on the 4th of May 1859.

It has been contended that this bill of exchange must be looked upon as drawn under the clause above set forth, and therefore neither of these defendants are individually liable. The bill is drawn at Hamilton by the defendant Smart, as secretary of the railway company. The statute does not provide for the secretary drawing, endorsing, or accepting. It is accepted by the defendant Macbeth as it is drawn on him, not as president, but simply adding "president" after his name. Assuming this for the moment to be an official act, where is the countersignature of the secretary? I cannot agree with the defendant's counsel that his signature as drawer is a countersignature to the president's acceptance, for if that were so, then the bill has no existence, for it has no drawer, and the president's acceptance is an acceptance of a blank bill so far as a drawer's name is concerned. It is true the bill is said and admitted to have been drawn and accepted by the consent of the board of directors; if that admission extended to an admission that it was drawn and accepted by the authority of the directors in pursuance of the section quoted, there is an end of the case, for then the admission puts an end to individual liability; but that has not been asserted, and when we take the evidence of Mr. Ball, it seems to amount to this—the defendant Macbeth owed £100 for a call on his stock, and that call was treated as paid on his undertaking to provide for this bill.

Then, if this bill is not within the statute, is it the acceptance of the defendant Macbeth, so as to make him personally responsible? In this respect it is undistinguishable from the case of the Bank of Montreal v. DeLatre (5 U. C. Q. B. 362). The defendant there was president of the Niagara Harbour and Dock Company. The bill was drawn on "P. C. DeLatre, Esq., president Niagara Harbour and Dock Company, Niagara, C.W.," and the acceptance was signed "P. C. DeLatre, president N. H. & D. C." There was no privity between the holders and the defendant or the company. The court held him liable. In the judgment the cases up to that time are considered. I will only add Mare

v. Charles (5 E. & B. 978), in which later decisions are referred to. There is no room to question this acceptor's liability.

With regard to the drawer, I was at first disposed to think he has so qualified the effect of his signature as to relieve himself, and that whoever took it, took it with notice that Smart was signing for the railway company. The great difficulty is in holding that the company can be treated as drawers, when the statute provides in what manner bills on which they are to be liable as drawers shall be signed and countersigned, and that provision is wholly disregarded. I arrive at the conclusion that he must, under all the circumstances, be treated as the drawer, and therefore liable.

I think we ought not to grant a new trial on the ground suggested by Mr. Becher. If the defendants had discovered anything to shake the evidence given at the trial, it should have been laid before us at the proper time on affidavits.

In my opinion the rule must be discharged.

*Per cur.*—Rule discharged.

See *Delander v. Gregory*, 35 Law Times, 101 Q. B.

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### EVERY V. THE PROVINCIAL INSURANCE COMPANY.

*Policy—Agent—In whose name action must be brought.*

*Held* that an action upon a policy of insurance must be brought in the name of the party in whose behalf the policy issued, and with whom the covenants are made.

The declaration stated that on the 25th of June 1855, defendants, by their policy of insurance of that date, insured certain persons, therein described as Geo. A. Vaughan & Co., against loss by fire to the amount of \$5,000 on their stock of dry goods contained in the first story of the three-storied brick building on the west side of the main street, and known as No. 204, in the city of Buffalo, which loss, if any, the defendants thereby agreed to pay to the plaintiffs.

Averment.—That at the date of the policy, and thence until and at the time of the fire, the plaintiffs had an inter-

est in the property mentioned in the policy sufficient for the purposes thereof, and the insurance thereby created and the agreement to pay them, and of enabling them to be the parties beneficially interested in the policy, and payment of loss, and that the said insurance was created and the policy made for them and upon the interest which they so had by and through the agency and procurement of the said Geo. A. Vaughan & Co., of all which defendants had notice and knowledge, and for such purposes made the policy and took the risk. That by the policy defendants agreed to make good to plaintiffs and their assigns all such loss and damage not exceeding \$5,000 as should happen by fire to the said property from noon on the 23d June 1855 until noon on the 23rd June 1856, to be paid within 60 days after notice and proof made by plaintiffs in conformity with the conditions.

Averment of loss and damage by fire, of notice to defendants, and proof by plaintiffs of the loss; that plaintiffs have done everything necessary to entitle them; that the 60 days are expired, and that defendants have not paid, &c.

The policy itself was annexed to the demurrer book that the court might read it as if incorporated in the declaration.

The defendants demurred to the declaration—1st, Because it shewed no cause of action to the plaintiffs, and shewed that the plaintiffs could not recover in a court of law in their own names; that the action should have been brought in the name of George A. Vaughan & Co., to whom the policy was granted; that it was not shewn that the plaintiffs had sustained any loss by fire, nor what was the nature of the insurable interest which, as they alleged, they had.

The policy of insurance stated that the defendants “do insure Geo. A Vaughan & Co. against loss or damage by fire to the amount of \$5,000 on their stock of dry goods contained in the premises as set out in the declaration. Insurance permitted to the amount of \$10,000. Loss, if any, payable to Every and McPherson.” This is the only mention of the plaintiff’s name, and there is no other reference to them in the policy; all the covenants on the part of the defendants are to and with *the assured*, and all condi-

tions to be observed towards the defendants are to be observed and kept by the assured or "by the party assured." The fourth condition endorsed on the policy is, that property held in trust or commission must be assured as such, otherwise the policy will not cover the property.

*W. H. Burns*, in support of the demurrer, cited *Ogden v. Montreal Insur. Company*, 3 C. Pl. U. C. 497; *Orchard v. The Ætna Insurance Company*, 5 C. P. U. C. 445; *Burton v. Gore District Mutual Insurance Company*, 14 U. C. Q. B. 343; *Beemer v. The Anchor Insurance Company*, 16 U. C. Q. B. 485.

*Eccles*, Q. C., contra, insisted that *Orchard v. Ætna Insurance Co.* sustained this action, for the declaration here averred that the plaintiff had an insurable interest, which the demurrer admits. He also cited *Powles v. Innes*, 11 M. & W. 10.

DRAPER, C. J.—I have not found any authority in the English courts or our own which determines the question raised in this case. The American authorities are, I apprehend, founded on some law not in force here.

But the case of *Orchard v. Ætna Insurance Company* very closely resembles this. There the defendants, on account of Captain W. H. Fellowes, insured \$1,200 on the freight only per schooner *Ocean*, Captain W. H. Fellowes, commander. In case of loss, to be paid to T. C. Orchard, Esquire, who brought the action upon the policy in his own name after the destruction of the vessel by fire. The defendants pleaded several pleas, on some of which the jury found for plaintiff, and on others for defendant, and the case came before the court on cross rules, the plaintiff seeking to enter judgment *non obstante*, and the defendant moving for a nonsuit on leave reserved, or for a new trial. *Macaulay*, C. J., in giving judgment, said,—“Under the plea of non-assumpsit he (the plaintiff) must establish a contract by the defendants with himself, to do which he must shew that he is the person named in and by the policy as insured, or the person beneficially interested in the insu-

rance in a way that entitles him to sue upon the policy. It appears, however, that Fellowes, the master (and not the plaintiff) is the person named in the policy, and is *primâ facie* the person insured, although it is stated in the margin, or at the bottom of the policy, that in case of loss the amount was to be paid to the plaintiff. That, I think, in legal construction, can only mean to be paid to him as agent or on behalf of Fellowes, and not as being himself the party insured." The case was, however, decided on another ground.

In these observations the learned Chief Justice does not notice the fact (mentioned by counsel in the argument) in that case that the policy did not contain the words "for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all," on which in Arnold on Insurance, sec. 19, it is observed that this is a clause invariably introduced into the common printed forms of policy used in England, as without it no one could take advantage of the policy except the party expressly named in it, but *by the aid of this clause* any party may avail himself of the policy who can prove that he was really interested in the subject-matter of the insurance during the risk and at the time of loss, and that he was the person on whose account the insurance was *bona fide* intended to be made. The alternative proposition stated by *Macaulay*, C. J., "or the person beneficially interested in the insurance in a way that entitles him to sue upon the policy," has reference, I apprehend, to marine policies only which contain the general clause above set forth. I find no authority whatever for extending that practice to cases like the present; nor do I find in the forms of fire assurance policies in common use anything equivalent to the general clause in marine policies, without which no one could sue who was not named in it as one of the parties assured.

The plaintiffs in this case sue as the persons with whom the contract of assurance is made, and contend that the words "loss, if any, to be paid to" them, enable them to sue upon a contract, the first line of which contains an

undertaking by defendants that they assure George A. Vaughan & Co. I regard the averment of the plaintiffs' interest as immaterial, for that is not enough singly. The possession of an insurable interest must be coupled with a contract of assurance between them and the assurers. I think no such contract appears on the face of this policy, and therefore that the defendants should have judgment on this demurrer.

Judgment for defendants.

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### METROPOLITAN BANK V. SNURE ET AL.

#### *Pro note—Pleading—Set-off.*

In an action on a pro note by the holder (endorsee) against the maker and endorsers,

A plea that the note was made and endorsed to third parties, who sent it to plaintiffs for collection, and that such third parties (who are indebted to defendants in a greater amount than the note) are the real owners of the note,

*Held* bad, on the authority of *Oulds v. Harrison*, 10 Ex. 572.

DECLARATION on a promissory note made by G. W. Snure, payable at the Metropolitan Bank, at New York, to J. Snure, endorsed by him to D. H. Moyer, and endorsed by him to plaintiff.

*Plea* that the note was made and endorsed, as in the declaration mentioned, to the International Bank, who afterwards sent it to the city of New York for collection only, and that it is now the property of the International Bank. That before the note became due, the International Bank was, and now is, indebted to the *defendants* in an amount greater than that of the note, for money had and received, for money paid, and for money due to defendants on the notes of the International Bank, payable to bearer on demand, and held by defendants; that before the note became due the International Bank became insolvent and unable to redeem their notes. That plaintiffs are not the *bona fide* endorsers of the note for value, but are suing as trustees or agents of the International Bank, in fraud of defendants, and in collusion with the International Bank, in order to deprive defendants of their right of set-off.

Demurrer and joinder.

*A. Wilson*, Q. C., supported the demurrer, citing *Oulds v. Harrison*, 10 Exch. 572.

*Jarvis*, contra, cited *Watkins v. Bensusan*, 9 M. & W. 422.

DRAPER, C. J.—In one respect this case is even stronger than that of *Oulds v. Harrison* (10 Exch. 572), for there the plea (6th) expressly stated that the bill was endorsed over to the plaintiff after it became due, an averment not contained in this plea, and the contrary whereof is to be inferred from what does appear. In the averment that the plaintiffs hold the bill as agents for the International Bank, and without value, to defraud defendants, and in collusion with the International Bank, the pleas are substantially alike, and we must assume the International Bank gave value for this note, or the defendant would not be claiming a right of set-off against them. The decision in *Oulds v. Harrison* is therefore a direct authority for the plaintiffs.

I am not at all sure that the plea is not bad on a different ground, not suggested in argument. The defendants being the maker and two separate endorsers of a promissory note, are sued in one action under our statute of Upper Canada, 7 Wm. IV., ch. 3. The statute 3 Vic., ch. 8, sec. 3, gives each of them a joint right of set-off, for any demand "which in its nature and circumstances arises out of or is connected with" the note, "or the consideration thereof, in the same manner and to the same extent as though such defendant had been separately sued." There is no averment that the set-off here pleaded is connected with the note or its consideration. It might be that the defendants, if the International Bank is, as the plea states, insolvent, have bought up their notes at a nominal price, to set-off against this note, since the plaintiffs became holders thereof.

Our judgment for the plaintiff proceeds, however, entirely upon the authority of *Oulds v. Harrison*.

Judgment for plaintiffs.

## SHORE ET AL. V. McCABE ET AL.

*Ejectment—Notice of title and defence—How far proof necessary when title not denied.*

*Held* that the omission of the words "besides denying the title of the plaintiff" in the defendant's notice of defence, did not entitle the plaintiff to recover without proving the title stated in his notice.

*Held* also, that the appearing of the defendant at the trial, he having filed an appearance without any notice of defence, would equally put the plaintiff on proof of his title; but having proved his title the defendant would be debarred from giving rebuttal evidence.

EJECTMENT (writ dated the 13th of September 1859) for the north-easterly half of No. 21, 6th concession, Albion. Judgment by default against Gordon and Taylor. Defence for the whole by Thomas McCabe. The claimants' notice of title was as heiresses of their brother Robert Shore, who was heir-at-law of John Shore, who died seised, and by a conveyance from William Horne, and Honora his wife, to the claimant Margaret, Honora being co-heiress with the claimants. The defendant gave notice that the nature of the title intended to be set up by him was as assignee of several conveyances of the original grantee of the Crown. By a further notice defendant's title was stated to be, by virtue of a deed of bargain and sale thereof, made by James Kenney, the grantee of the Crown, to James Smith, by bargain and sale from Smith to Edward Shortis, under whom defendant claimed title to the possession.

At the trial at the Toronto January assizes, 1860, before *Burns, J.*, the plaintiffs proved that John Shore began to work on this land in 1827, claiming to be owner, as having bought Mr Kenney's right. He worked there in 1827-8 and 9, in which latter year he left the land in possession of his brother's widow and her family, who worked the place until 1837. John Shore came back occasionally to see them, but not to live there. He desired one Rodehouse (a witness) to look after the land that no one cut the timber. The brother's widow and family did not live on this lot, but on No. 24, also John Shore's property, and which he afterwards sold. About eleven years before the trial, McCabe, the defendant, and Gordon, came on the lot and put up a shanty; Rodehouse went over to speak to them about it; they asserted some

right. Rodehouse did not at once send word to John Shore, who not long afterwards died. The lot had been unoccupied four or five years before Gordon and McCabe went on to it. John Shore died in January 1849. His papers remained, until May last, in the possession of a niece of his, who obtained them after his death. She identified one, which was a bond from James McCinney, of York, labourer, unto John Shore, of the township of Albion, in the penal sum of £50, dated the 5th of February 1827, conditioned, that "James McCinney, or his agent or attorney, shall and may do, or cause to be done, a good and lawful deed in fee unto the said John Shore, his heirs or assigns, for any grant of land for which I have a grant in council, being for 100 acres; he the said John Shore pays all expenses attending the same except the [three words illegible.] Then and in such case the foregoing obligation is considered as null and void, otherwise to remain in full force and virtue. Signed with my hand and sealed with my seal on the day first above written. (Signed) James McKenney, his mark." Signed also by John McFarlane and Andrew Shee, apparently as witnesses. She also identified a grant from the Crown as having been found by her among John Shore's papers. This was a grant under the great seal of Upper Canada to James McKenney, of the town of York, yeoman, of 100 acres, being the lot in question in this cause. It bore date the nineteenth of May 1828. Evidence was given sufficient to establish that the plaintiffs and their sister Honora were co-heiresses of John Shore, and a conveyance from Honora and her husband of her right to the plaintiff Margaret was put in and admitted, dated the 13th of August 1859.

It was objected that the plaintiffs' claim set up that John Shore died seised, which was not proved. The plaintiffs' counsel answered, that in the defendant's notice of his title he had not denied the plaintiffs' title. The learned judge stated that he should consequently withdraw from the consideration of the jury the point whether John Shore died seised.

The defendants put in evidence a deed dated the 7th of September 1833, made between James McKenney, "now of

Niagara," yeoman, and James Smith, whereby in consideration of £40 McKenney conveyed to James Smith in fee this same parcel or tract of land in Albion, executed by James McKenney, whose name is written and witnessed by William Hall and James King. A receipt for the consideration money is endorsed, witnessed by James King alone. It was registered on the 8th of May 1849. The death of James King and his signature as subscribing witness were proved. Enquiry for the other witness was also proved at Niagara, where he had lived about the time the deed bore date, but he could not be traced.

The execution of a deed for the same land, dated the 1st of May 1849, from James Smith to Edward Shortis, was admitted. It was objected that the conveyance from McKenney to Smith was void, because at its date either John Shore or his brother's widow were in possession, and it was contrary to the statute Hen. VIII., and to the common law, that McKenney could convey to Smith, and that if the deed operated, more than twenty years have elapsed without the grantee entering.

The only question submitted by the learned judge to the jury was, whether the deed of 1833, from James McKenney to James Smith, was a genuine deed from the grantee of the Crown.

The jury gave a verdict for the plaintiffs.

In Hilary Term *Bell* (of Toronto) obtained a rule *nisi* for a new trial without costs, on the ground of misdirection, in ruling that the plaintiffs were not bound to prove title to the premises pursuant to their notice of claim; that the verdict was contrary to evidence, as the title under which the defendants claimed was proved; and the verdict was contrary to law, as plaintiffs proved no title by possession or otherwise.

*C. Patterson* shewed cause. He contended that the defendants' notice of title, by omitting the words "besides denying the title of the claimant," admitted the title set out in the claimant's notice. He also renewed the objection to the deed from McKenney to Smith, taken at the trial.

*Bell*, contra, insisted that the plaintiff must fail for not

having proved any right to possession of the land, and that having relied in their notice on the fact that John Shore died seised, they must fail, as they did not prove that fact.

DRAPER, C. J.—The 232nd section of the Common Law Procedure Act 1856 enacts, that in case an appearance be entered in ejectment, an issue may be made up without any pleadings, setting forth the writ and stating the fact of the appearance, with its date, and the notice limiting the defence, if any (under the 228th sect.), of each of the parties answering, *so that it may appear for what defence is made.*

By sec. 234 the claimant may proceed to trial, as in other actions, and the particulars of the claim and defence, and the notices of claimant and defendant of their respective titles, if any, or copies thereof, shall be annexed to the record by the claimants, and the question at the trial shall (except in certain cases, of which this is not one) be, whether the statement in the writ of the title of the claimants is true or false.

Sec. 237 provides that if the defendant appears, and the claimant does not appear at the trial, the claimant shall be nonsuited, and if the claimant appear, and the defendant does not appear, the claimant shall be entitled to recover, without any proof of his title.

Sec. 222 requires that to the writ and copies served shall be attached a notice of the nature of the title intended to be set up by the claimant, stating it with reasonable certainty, and such notice shall not contain more than one mode in which title is set up, without leave of the court or a judge, and at the trial the claimant shall be confined to proof of the title set up in the notice.

And sec. 224 requires that every person appearing shall with his appearance file a notice addressed to the claimant stating that the defendant, besides denying the title of the claimant, asserts title in himself, or in some other persons (stating whom) under whom he claims, in like manner and to the same extent, and subject to the same conditions, rules, and restrictions as are set forth in the 222nd sec. in respect to the notice of a claimant's title and the giving proof thereof at the trial.

The language of the act is so distinct, and its object and intent so clearly set forth, in the 232nd, 234th, and 237th sections, as to the effect of an appearance being entered, and of the questions thereby raised for trial, as well as of the consequence of either party making default in appearing, that it requires something equally clear both in language and intention to modify or defeat the operation of these sections, and to justify any construction other than that which the words obviously import.

The 222nd and 224th sections should be read together, for each of them is I think plainly intended to operate to the same extent and in the same manner for and against the claimant and the defendant respectively.

The apparent object was, that each party should know beforehand what he had to contend against, that he might prepare his case or defence accordingly; that there should be no surprise on either party, by his opponent setting up some right or title of which he had no previous notice; and that neither party should be put to the expense of preparing to repel a title which his opponent possibly might set up if he found him unprepared to meet it. There is nothing in the 222nd section which has been found in practice inconsistent with working out this intention.

But it is argued that the introduction of the words "besides denying the title of the claimant" gives a different character and effect to the 224th sec., and that the omission of those words from the defendants' notice of title amounts to an admission that the plaintiff is entitled to recover unless the defendant proves the title set forth in his notice.

It appears to have escaped attention that this notice of defendants' title is to be filed with his appearance, which appearance, a few sections further on, is declared to be sufficient without pleadings to raise an issue *whether the statement in the writ of the title* of the claimant is true or false. I cannot understand how a mere notice omitting these words can so completely override the effect given to the appearance by the 232nd and 234th sections.

The words "besides denying," &c., are a mere reference to the effect which filing an appearance has in an action of

ejectment. If the defendant filed an appearance, and gave no notice of his intention to set up any title, the claimant's right to possession would be in issue by force of the appearance, and I cannot see that giving a notice that he intends to set up some specified title omitting the words "besides denying," &c., should relieve the plaintiff from proving his case.

The 232nd and 234th sections are transcripts from the English statute, which contains nothing like the 222nd and 224th, so that there is no help to be derived from English authority as to whether the sections affecting notices of title intended to be set up affect the others, or alter the position of the parties, further than is positively expressed in them.

If a claimant were to omit to give a notice of title, it would, I apprehend, be an irregularity only ; and if the defendant filed an appearance, notwithstanding such an omission, I do not think that he could rightfully claim that the plaintiff should be nonsuited. On the other hand, if the defendant appeared without giving any notice, it cannot be pretended that it would be an irregularity, far less that it would entitle the claimant to sign judgment. It would simply preclude the defendant from setting up title in himself ; the claimant would still have to prove his title to the possession, which the appearance denies. If he did this he would be entitled to succeed, because the defendant, "besides denying the title of the claimant," had not given notice of any title on which he meant to rely.

It therefore appears to me the jury ought to have been directed to enquire whether this land belonged to John Shore, whether he died seised, and whether the claimants were his co-heiresses; or perhaps it might be said, that as no proof was given of legal title in John Shore, that the plaintiffs should be nonsuited. That John Shore dying seised was material cannot be doubted, not because it was so stated in the claimant's notice of title, but because if he did not they could not inherit this land from him.

In my opinion, the verdict should be set aside and a new trial granted without costs.

*Per cur.*—Rule absolute without costs.

## FEEHAN V. BANK OF TORONTO.

*Bill of Sale—Registry—Operation of by relation back to date—Appeal—County Court.*

*Held* that an appeal will lie from the County Court to the Superior Courts upon an interpleader as well as other matters.

2. That the registering of a chattel mortgage does not cause it to operate and have relation back to the day of its date, but takes effect only from its registry, a *fi. fa.* placed in the sheriff's hands between its date and registry would therefore cut it out.
3. That an interpleader issue is to be taken distributively, and the issues found accordingly, and the jury having found an assignment (which was otherwise cut out by a *fi. fa.* placed in the sheriff's hands before registry) was valid on the ground of an immediate delivery and an actual and continued change of possession.

APPEAL from the County Court of the United Counties of York and Peel.

Interpleader issue to try whether certain goods and chattels, the property of one P. J. O'Neill, were at the time of the placing a *fi. fa.* in the sheriff's hand, the goods of the plaintiff.

The case came on for trial on the 15th day of December A. D. 1859. Notes of evidence. Execution put in the 14th of September, assignment dated the 12th of September, and registered on the 15th of September.

*Cornelius Archibald*, for plaintiff, was in employment of Mr O'Neill as bookkeeper, he owed me, and I signed assignment on the morning of the 13th of September. Carrol signed about a week ago. Signature of O'Neill admitted. Plaintiff came to store before ten o'clock, a.m., on the 13th of September, came as O'Neill's assignee, gave instructions to open a new set of books, told him not to trust without consulting him. He employed O'Neill at a salary to make sales and correspond after consulting plaintiff. All cash which was received was deposited in the bank in a new account in the name of plaintiff. A few days afterwards the sheriff came in. Plaintiff continued to sell after the sheriff came in, and to deposit in bank.

*Cross-examined.*—Assignment was signed by O'Neill

MEM.—What is a sufficient compliance with the statute as to giving a report of the Judge's "charge, judgment, or decision" in an appeal book?

See the same case in 19 U. C. B., as to the points in this case, in which the opposite conclusion has been come to.

when I signed it. O'Neill owed me something over £90. O'Neill's name continued over the door; the plaintiff's name did not appear; no new goods were brought in; this was all that was done. Carrol was a creditor to the amount of about \$300; Webb for over \$100 for baker's account—(these were creditors who had signed the assignment). O'Neill owed altogether between £11,000 and £12,000. I am now in the employment of plaintiff at \$10 per week, which he has paid; O'Neill gets \$21 per week. O'Neill continued in the house on Duke Street as before.

*Helliwell* moved for a nonsuit, and took the following objections:—1st. No change of possession at all as to furniture. 2nd. Assignment not registered until after the execution. 3rd. Costs of preparing assignment a preference. 4th. Proviso, assignment must be signed before any benefit can be obtained. 5th. Defective description as to stock in trade.

*Peter James O'Neill* for defendant. My liabilities amount to about £10,000; my assets, good, bad and indifferent debts, stock and book debts, £4500 above my liabilities; everything in assignment; I have sold goods to a good extent since assignment; I was sued considerably when I made assignment; that was the reason I did it; I made assignment to prevent defendants getting their pay in full.

*Cross-examined.*—The plaintiff came on the 13th, in the morning; I handed over part of the stock in name of the whole; that was all; he placed me in charge.

*Re-examined.*—Did not go to furniture at all; he gave me the use of the furniture until the stock was reduced so low that a sale by auction would be necessary. The Bank of British North America are the largest creditors. I never asked any one but Carrol to come in.

The learned judge in his charge asked the jury—1st, whether there was a change of possession independent of assignment—1st as to furniture, 2nd as to stock; and 2nd, whether the transaction was honest.

The jury said—1st. There was a *bona fide* change of possession as regards the stock. 2nd. There was no change of possession as regards the furniture. 3rd. There was fraud

in the assignment, because it was made to prevent defendants from getting their claim in full. He directed the jury to find for plaintiff, leave being reserved to enter nonsuit for defendant upon the whole case.

Upon these facts the jury found for defendant.

Upon a motion made in term for a new trial, the judge discharged the rule, against which decision this appeal was made, upon the following grounds:—the appellant appeals from the judgment of the said County Court in the cause therein pending, wherein the said appellant is plaintiff, and the said respondents are defendants upon motion and rule to enter a verdict therein for the said plaintiff, pursuant to leave reserved at the trial, or for a new trial on grounds specified, and contends that the said rule ought to have been made absolute on one or other of the said grounds.

*Eccles*, Q. C., for appellant, contended that a bill of sale is good for five days at all events, and when registered takes effect back from its date; he referred to *Maulson et al. v. Peck et al.*, 18 Q. B. U. C. 113; *Harris v. Commercial Bank*, 16 U. C. Q. B. 437; *Rose v. Scott*, 17 U. C. 385; *Perrin v. Davis*, 9 C. P. 147.

*M. C. Cameron*, on same side, referred to *Balkwell v. Beddome*, 16 Q. B. U. C. 206, and contended that the words in the judgments in the above cases shewed a bill of sale to operate from its date after registry.

*Helliwell*, contra, contended that a subsequent registered assignment should not be allowed to cut out a prior judgment with a *fi. fa.* in sheriff's hands; as to description he referred to *Hutchison v. Roberts*, 7 U. C. C. P. 471.

DRAPER, C. J.—The first question arising in this case is on the preliminary objection that this is not an appealable matter.

Appeals from the county to the superior courts are regulated by Consol. Stat. U. C. ch. 15, sec. 67, which enacts, that in case any party to a cause on the common law side in any of the county courts is dissatisfied with the decision of the judge upon any point of law arising on the pleadings,

or respecting the reception or rejection of evidence, or with the charge to the jury, or with the decision upon any motion for a nonsuit, or for a new trial, or in arrest of judgment, or for judgment *non obstante veredicto*, the judge at the request of such party, his counsel or attorney, shall stay the proceeding for a term not exceeding four days, in order to afford the party time to execute and perfect the bond required to enable them to appeal the case. Sec. 68 makes regulations respecting the bond, and then enacts that at the request of the party appellant the judge of the court appealed from *shall certify* under his hand to either of the superior courts of common law, named by the appellant, the pleadings in the cause, and all motions, rules, or orders made, granted, or refused therein, together with his own charge, judgment, or decision, and when a trial has been had, the evidence and all objections and exceptions thereto, whereupon the matter shall be set down for argument, &c.

Unless the fact that this is an interpleader issue makes any difference, the matter may be appealed from, namely, the decision of the learned judge on a rule for a new trial without costs. The court of appeals decided in the case of *Wilson v. Kerr*, in January last, that an appeal did lie in an interpleader suit, instituted in the superior courts of common law, acting upon the judgment given in the Exchequer Chamber in the case of *Withers v. Parker*, reported in 6 Jur. N. S. 22. It does not appear to me that there is anything to be found in the language of the act giving an appeal from the decisions of the county court which can distinguish it from that case. The district (now county) court act gave an appeal in these interlocutory matters as early as 1845. Its terms are as large, in respect to decisions on rules for new trial, as those of 20 Vict., ch. 5, sec. 15, and leave no room to doubt that this is equally within the principle of *Withers v. Parker*.

Then on the merits of the appeal the first question is, whether, assuming this assignment to be unaccompanied by an immediate delivery, and followed by actual and continued change of possession, it has relation back to and takes effect from the day of its date, by reason of its having been

registered, as required by Consol. Stat. U. C., ch. 45, within five days from the execution thereof, so that the defendant's *fi. fa.*, which came into the sheriff's hands after the day of the executing, but before the registering, is cut out.

Second.—If the decision of this question is against the plaintiff, then whether there was an immediate delivery and an actual and continued change of possession, so that the assignment would be operative at common law.

Third.—Whether the finding of the jury that the assignment was fraudulent *because* it was intended to prevent the defendants obtaining satisfaction of their debt in full, will avoid it, if otherwise good either under the statute or at common law. The question of the sufficiency of the description was also raised, but coupling the assignment with the schedules I think it a sufficient compliance with the act.

The case does not inform us whether the jury were directed that the deed took effect by relation, as contended by the plaintiff's counsel, or no; nor what direction was given as to what in point of law would constitute fraud if the assignment was duly registered, or if there had been an immediate delivery, or an actual change of possession; nor on what ground the deed could be held fraudulent if the statute had been complied with, or if not, if there had been such delivery and change of possession. I apprehend the statute in cases of appeal, other than such as would constitute error on the record, requires more than the mere statement that the rule, the decision upon which is appealed from, was either made absolute or discharged. The jury in fact have given a verdict for the defendant, although according to the statement in the appeal book they were directed to find for the plaintiff, with leave reserved to defendant to move to enter a nonsuit. The court may find themselves obliged to remit the case back to the county court, for want of that report of the judge's "charge, judgment, or decision," which the statute directs, though they would be reluctant to do so, on account of the delay and vexation to the parties interested, and the additional expense it would create.

If there was any analogy between an assignment like the present and a deed of bargain and sale requiring enrolment under stat. 27 H. 8, ch. 16, then a bill of sale or mortgage of chattels, if registered as our act requires, would no doubt have relation back to the day of its date; but I think no such analogy exists.

Under the first act respecting chattel mortgages (12 Vic., ch. 74), such instruments were absolutely void where there was not immediate delivery and continued change of possession against creditors, &c., of the mortgagor, "*unless*" filed as thereby directed. I take the word "*unless*" to have the import of "*until*" in construing that act, because the mortgagee might file whenever he pleased, and his security would operate from the date of the filing, as against parties subsequently coming in, but it never was pretended that it could have relation back to the date of delivery, for such a construction would have defeated the very object of the act. For then, although there was no immediate delivery, and no change of possession, nor yet any bill of sale, &c., filed pursuant to the act, the property would nevertheless pass and the recourse of creditors would be defeated.

Then, when the last act requires, among other things, that the bill of sale, &c., shall be registered within five days from the executing thereof, otherwise the sale shall be absolutely void, we have only to enquire whether this provision was introduced for the benefit of mortgagees so as to establish a relation between the day of registering and the day of executing, and to give an effect to such instruments which they had not before, or to give a further protection to creditors and subsequent purchasers and mortgagees by requiring registration within five days on pain of such instruments becoming wholly inoperative.

I have not the slightest doubt but that the latter is the true construction, and that any actual sale and delivery of the goods made by the mortgagor to an innocent purchaser after the date of the mortgage and before its registration, or any second mortgage to an innocent mortgagee, registered within five days, and before the registering of the first, would respectively prevail; and in like manner I am of

opinion that the defendant's *fi. fa.* against goods delivered to the sheriff before this mortgage was registered, bound the goods, and that the mortgage became inoperative for want of registry, although afterwards registered within the five days. In other words, I treat the act as declaring that until registry, every bill of sale, &c., of goods, not accompanied by immediate delivery, and followed by actual and continued possession, is against creditors absolutely void; and further, that registry will not make it valid unless it takes place within five days. At the time that defendant's *fi. fa.* was put into the sheriff's hands, the assignment as against them was therefore void, and it did not become less so by reason of the subsequent registry within five days.

I think, therefore, the appeal fails entirely so far as this objection is concerned, which was the principal point in the case.

But the jury have in effect found that as to the stock there was a *bonâ fide* change of possession, by which I take it we must understand that the assignment thereof was accompanied by immediate delivery, and followed by an actual and continued change of possession, still they found generally for the defendant. The plaintiff appeals against the judgment of the court upholding that verdict, because as to this portion at least he is entitled to succeed.

Assuming an assignment for the benefit of creditors to have been accompanied by delivery, and followed by a change of possession, it does not require to be filed under the chattel mortgage act, and as regards this stock in trade, therefore, the plaintiff had a right to recover. I think that an interpleader issue is to be taken distributively, and that there may be a finding for the claimant as to one part, for the execution creditor as to another, and as to this portion of the issue I think the appeal should be allowed.

As to the furniture, it is exactly the reverse. The jury have found there was no change of possession, and therefore the appeal should be so far dismissed.

The fraud found by the jury I think amounts to nothing, for the explanation they gave of the ground on which they found fraud would equally apply to every assignment where the assignor could not pay all his debts in full.

I think, therefore, the rule granted by the court below, discharging the rule to enter a verdict for the plaintiff, should be varied by making the same absolute as to the stock in trade, and discharging it as to the furniture, and that the learned judge of the county court should make such order as to costs of the interpleader order and issue as he may deem right.

And that the plaintiff should pay the costs of this appeal.

Appeal sustained as to stock in trade;  
dismissed as to furniture.

### THE QUEEN V. POTTER.

*Misdemeanour—Bond for deed—Seizure of—Assignment of to defraud creditors.*

Upon an indictment under 22 Vic., ch. 96, for making an assignment to defraud creditors,

*Held* that a money bond is personalty seizable on an execution under the statutes 13 & 14 Vic., ch. 53, and 20 Vic. ch. 57; and further, that a transfer made by a party to a creditor, who accepted the same in full satisfaction and discharge of his debt, did not render the party making such assignment less liable under this indictment.

*Richards, J.*, dissenting.

CASE reserved for the opinion of the court, tried at the assizes held at Guelph in the autumn of 1859.

*Misdemeanour.*—The indictment was framed upon the 21st clause of statute 22 Vic., ch. 96.

The 1st count charged the defendant with making a transfer to one William Malloy of certain land known as the south-west corner of lot number 19, in the 3rd concession of the township of Peel, with intent thereby then to defraud Henry Moncreif Finlayson, Joseph Rogers, and others, then being creditors of the said Joseph Potter.

2d count charged the defendant with causing to be made a conveyance, &c., the same land with the same intent.

3rd count charged the defendant with making an assignment to Malloy of certain personal property, known as a certain bond or writing obligatory, made by one William Woods to the defendant, dated the 15th of March 1856, conditioned for the conveyance by Woods to the defendant of the land mentioned in the first count, with the same intent stated in the other counts.

The defendant was tried before *Burns, J.*, at the last assizes held at Guelph. The facts proved were these:— Joseph Potter held a bond for a deed of the lot of land mentioned in the indictment, being one acre on the corner of the lot upon which were erected buildings used as a tavern stand. The land had been paid for to William Woods, but the reason why it had not been conveyed was that Woods had not obtained the patent for the lot number 19. In January 1859 the defendant was indebted to Finlayson and Rogers upon judgments they had obtained some months previously in the division court, and upon Rogers' judgment the defendant had been examined before the judge of the county court. In the month of November 1858 Finlayson was pressing the defendant for satisfaction of his judgments. The defendant seemed to be involved, and unable to carry on and meet engagements. Finlayson offered to purchase the tavern stand in November 1858, and allow as part of the price the amount of his judgments, and for the residue he would give his promissory notes on time to be given to the defendant's other creditors. The price which Finlayson stated he would give was \$800. The defendant declined the offer, as he considered the property worth \$1200 or upwards. Malloy, the person mentioned in the indictment, was also a creditor of the defendant upon judgment he had also obtained in the division court. About the 20th of January last Malloy was pressing the defendant upon his claim, and had an execution in the hands of the bailiff of the division court against the defendant's goods. Malloy took the bailiff with him and went to the place of the defendant, and there pretended to the defendant's brothers, so that it should come to the defendant's ears, that he had a warrant to arrest the defendant's person. This was told to the defendant, and he became alarmed lest he should be arrested, and afterwards Malloy and the defendant met together, without the presence of any third person, and entered into an arrangement between themselves. They both told other parties that the arrangement was as follows: Malloy was to discharge his judgment, amounting

to some \$62, and give his promissory-notes to defendant for \$350. The execution, which was then in the bailiff's hands, was to be proceeded with so as to sell the goods, and Malloy was to buy them in and give the goods or the proceeds thereof to the defendant's wife. Malloy was to carry the defendant to Woodstock, to place him on the route to Detroit, in order to leave the country, and afterwards Malloy was to carry the defendant's wife to Detroit in order to join her husband. The arrangement was carried out by the defendant making an assignment of Woods' bond for the deed to Malloy, and Malloy giving his notes for \$350, which notes the defendant transferred to his brothers. The defendant was secreted by Malloy and defendant's brothers for about a fortnight, and then made his way to Detroit. The bailiff seized the property of defendant and sold it, but it seemed Malloy did not perform his part of the agreement in giving the proceeds of the sale to the defendant's wife. Malloy, under the bond for deed and assignment to him, procured the conveyance of the land from Woods on the 8th of March 1859.

The jury found the defendant guilty generally upon the indictment, with the understanding that if the evidence should sustain the charge in any shape it might be restricted to such count as the court might think sustained.

The following points were submitted for the opinion of the court:—1. The transfer by defendant was of that which is not subject to an execution, for Potter only held an equitable interest in the land, and none of the counts will apply to that interest. The 1st count was not sustained, because defendant did not convey, and the meaning of the statute is that it should be some legal estate conveyed. The 3rd count was not sustained, because a bond for a deed of lands cannot be goods and chattels. The 2nd count, if that can be sustained by reason of the assignment of the bond, yet it should be a legal estate and not an equitable one which should be the subject-matter of an indictment.

2nd. The defendant made a transfer of the property to a creditor in satisfaction of the demand of that creditor, and

for other considerations, and so the case is not within the statute at all.

*Harrison*, for the Crown, cited 22 Vic., ch. 96, sec. 21 ; Doe dem. Keogh v. Calhoun, 1 U. C. Q. B. 157.

No one appeared for the prisoner.

DRAPER, C. J.—The 89th section of the 13 and 14 Vic. ch. 23, authorises the bailiff of a division court to seize and take in execution any money or bank notes, or any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money belonging to any person against whom execution has issued.

The 22nd section of 20 Vic., ch. 57, authorises the sheriff, on a *fi. fa.* against goods, to seize among other things, “bonds, mortgages, specialties, or other securities for money,” and to hold “any such bonds,” &c., as a security or securities for the amount directed to be levied; and the sheriff may sue in his own name for the recovery of the sums secured thereby when the time for payment has arrived.

Under the absconding debtors’ act (19 Vic., ch. 43, sec. 49, and Con. Stats. U. C., ch. 25, sec. 14) “All the property, credits, and effects, including all rights and shares in any association or corporation, of an absconding debtor, may be attached in the same manner as they might be seized in execution;” and the sheriff shall make an inventory of all the personal property, credits, and effects, evidence of title or debts, books of account, vouchers, and papers that he has attached; and by sec. 25 of the Con. Act the sheriff may sue for and recover the debt, claim property or right of action owing to or recoverable by the absconding debtor, and shall hold the moneys as assets of the absconding debtor’s estate.

A bond with a money penalty, conditioned to convey real estate to the obligee or his assigns, may not perhaps be within this enactment, as by the construction put upon other statutes the words “securities *for money*” have been treated as referring equally to “bonds and specialties.” In the absence of authority, and in this country, where lands are

liable to be sold in execution, I should have been strongly inclined to a contrary opinion, and the absconding debtor's act seems to make the question more free from difficulty as to a bond such as the present being liable to be attached.

I put the first and second counts out of the question. If the evidence will sustain a conviction, it is certainly on the third count only, which charges the defendant with making an assignment to one Malloy of certain personal property, known as a certain bond or writing obligatory made by one William Woods to the defendant, conditioned for the conveyance by Woods to the defendant of land therein described and stated in the indictment, with intent to defraud certain of his creditors named in the indictment.

The 21st sec. of 22 Vic., ch. 96 (Con. Stats. U. C., ch. 26, sec. 20), enacts that "any person who shall make or cause to be made any gift, conveyance, assignment, sale, transfer, or delivery of any of his lands, hereditaments, goods, or chattels, or who shall remove, conceal or *dispose of* any of his goods, chattels, property, or *effects of any description* with intent to defraud his creditors, or any of them, shall be deemed guilty of a misdemeanor."

I think the conviction on the third count sustainable. The first objection raised is, that it is not goods and chattels. It certainly at law is not real estate, or annexed to reality; it would go to the executor, not to the heir. In case of breach the executor must sue.

It is next objected that the transfer was made to a creditor, and was by him accepted in satisfaction of his debt. I think the evidence was properly left to the jury to say whether the defendant put the property out of his hands, transferred, assigned, or disposed of it, for the purpose of defrauding his creditors, although in the course of that transaction he satisfied a debt due to the creditor to whom the property was assigned. The question was, with what object and intent this transfer and assignment was made. Was it a sale in good faith to Malloy to satisfy his debt—taking his notes for the price agreed to be paid after deducting that debt—or was it a device to enable the defendant to abscond, taking away the new evidences of debt, viz, Mal-

loy's notes, so that there would be nothing for the creditors to attach, or out of which to obtain satisfaction. The evidence was amply sufficient to sustain the conclusion that the defendant certainly, and Malloy possibly, or I should say most probably, combined for this purpose, of which so far Malloy seems to have gained the benefit, and the rest of the defendant's creditors are left unpaid.

It does not appear whether the bond in question might not have become absolute in law, from the condition being left unfulfilled within the proper time. If it were so, it would add strength in my view to the conclusion that the conviction is right.

There is no doubt great force in the argument of my brother *Richards*. But technically speaking the bond is in itself a bond for money, though liable to be defeated by the performance of another act, and after default, and the condition gone, it is a bond on which money, though in the shape of damages, not of a debt, would be recoverable. At law the obligor might, I presume, discharge himself by paying the penalty. And I do not feel altogether bound by the case of *Sims v. Thomas*, because, admitting that if the test were that goods must be such as could be taken in execution in order to make their transfer fraudulent under the 13th Eliz., or under two of our acts above cited, and even under the absconding debtors' act (which, however, is open, I think, to great doubt) the language of the statute in question is more extended, and the object is larger. It speaks of goods, chattels, property and effects "*of any description*;" its design is to punish fraud. A bond to indemnify the obligee might not fall within it, but there is a very obvious distinction between that and a bond conditioned to convey land. I think there is little room for doubt but that while the facts charged in the indictment are within the letter of the statute, so also it is within its spirit, and that the fraudulent alienation of such an instrument is within the mischief intended to be prevented. Without venturing to question decided cases, I have no great respect for those dicta which seem to treat it as part of the duty of a judge to pass by the spirit of an act if a rigid adherence to its

letter will prevent a conviction of the accused, which in effect treat the maxim "*Qui hæret in litterâ hæret in cortice*" as inapplicable to statutes defining offences and providing for their punishment.

The result, in my opinion, is that a verdict of not guilty should be entered on the first and second counts, and the conviction on the third count should be affirmed.

RICHARDS, J.—As I understand the case as stated by Mr. Justice *Burns*, it is whether the defendant, having fraudulently transferred a bond for a deed of land, is guilty of a misdemeanor under prov. stat. 22 Vic., ch. 96, sec. 21; Con. Stat. ch. 26, sec. 20.

The words of the section, so far as may be necessary to be considered in connexion with the case, are—"Any person who makes any gift, conveyance, assignment, sale, transfer, or delivery of any of his lands, hereditaments, goods, or chattels, or who removes, conceals, or disposes of any of his goods, chattels, property, or effects of any description, with intent to defraud his creditors, or any of them, and any person *who receives* such property, real or personal, *with such intent*, shall be deemed guilty of a misdemeanor."

The bond referred to cannot be considered as lands or hereditaments within the meaning of the section. Then is it goods or chattels; I think not. Under the stat. 13 Elizabeth, ch. 5, against fraudulent conveyances, the words are "every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments," goods, or chattels, made with fraudulent intent, "shall be taken (as against creditors) to be clearly and utterly void." In *Sims v. Thomas*, 12 Adolphus & Ellis, 536, it is expressly decided that an annuity bond was not goods and chattels within the meaning of that statute, and after referring to authorities, and a full argument on the point, the court held that the statute of Elizabeth only extended to the assignment of such effects as are liable to be taken in execution. The words of our statute resemble those of the statute of Elizabeth, but our statute not only refers to the gift, conveyance, assignment, sale, transfer, or delivery of lands, goods, or chattels,

but also says any person who removes, conceals, or *disposes* of any of his goods, chattels, property, or effects of any description with intent, &c., shall be guilty of a misdemeanor. So the concealing and removal of goods and chattels is also made a misdemeanor by our statute. Do the words "disposes of," as here used, mean the same thing as the sale, transfer, and delivery in the former part of the sentence? I think not. I think they must be held to mean something different, and that what under the former part of the sentence would be considered an offence could not be so considered under the other part of it. The second branch of the sentence, in fact, seems to refer to acts which may be done by the defendant alone, without the aid or co-operation of any other person, whilst the acts first referred to contemplate the participation of a third person in what is done, and if he receives "such property, real or personal," *with such intent*, he shall be guilty of a misdemeanor. The words last quoted speak of property, real or personal, received, not "property or effects of every description," as in the second branch of the sentence, bringing us back in fact to the kind of property referred to in the first part of the sentence.

The view I take of this section is that there are offences of two kinds referred to—*first*, when there is a gift, assignment, transfer, or delivery of property, real or personal, with a fraudulent intent. *Second*—when a person "removes, conceals, or *disposes* of any of his goods, chattels, property, or effects of any description," with like fraudulent intent; but the disposing of in this sentence is disposing of in a different way from the gift, assignment, transfer, or delivery before spoken of. The offence first referred to can only be committed by the co-operation of a third person; that *secondly* mentioned may be consummated by the act of the defendant alone. That which requires the co-operation of a third person makes those persons guilty of a misdemeanor when they receive such "property, real or personal," with "such intent."

The defendant in this case, if guilty at all, is guilty of committing the offence first referred to. I think *Sims v. Thomas*

is a strong authority to shew that the defendant cannot be properly convicted under this indictment for that offence if the bond assigned could not be taken in execution. Lord Denman's words are—"We therefore think that it is only such things as may be taken in execution that are affected by the statute of Elizabeth. Bonds indeed are now liable to be taken in execution, but they were not so at the time of the making the indenture of assignment."

The division court act of 13 and 14 Vic. ch. 53, sec. 89 (Con. Stat. 22 Vic. ch. 19, sec. 151), in addition to the seizure of goods and chattels under an execution issued out of any of the division courts, authorises the seizure of money or bank notes, and "any cheques, bills of exchange, promissory notes, bonds, specialties, or securities *for money* belonging to such person."

I have always considered that choses in action liable to seizure under this provision were such as were for the payment of money. I think the meaning of "bonds, specialties, or securities for money" is where any of these are taken as securities for money. The words in prov. stat. 20 Vic. ch. 57, sec. 22, authorising the seizure by the sheriff of securities of this nature, under executions out of the superior courts of common law, and out of county courts, are very like those quoted. By that section of the act sheriffs are authorised to seize "any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, *or other* securities for money."

By sec. 152 of ch. 19 of Con. Acts it is further provided that the bailiff for the benefit of the plaintiff shall hold any cheques or bonds, specialties, or other securities for money so seized, as a security for the amount to be levied under the execution, and the plaintiff, when the time of payment thereof has arrived, may sue in the name of the defendant for the recovery of the *sum* or sums *secured* or made payable thereby. Under the 261 sec. of ch. 22, Con. Acts, the sheriff is to hold the cheques, &c., bonds, specialties, "*or other* securities for money," as a security for the amount endorsed on the writ of execution; and such sheriff "may sue in his own name for the recovery of *the sums secured thereby, when the time of payment* thereof has arrived."

Construing these statutes in *pari natura*, I am of opinion that no chose in action can be seized under an execution out of the division or other courts of common law unless it is *for the payment of the money*. The bond assigned by the defendant was conditioned for the conveyance of land, and therefore could not be seized under an execution against his goods and chattels.

If it could not be seized under an execution against goods and chattels, I do not think the fraudulent transfer of it comes within the meaning of the statute already referred to. I am therefore of opinion that the defendant ought not to have been convicted under the indictment.

It is not necessary to decide expressly in this case whether even if the bond could be seized under an execution, the fraudulent transfer of it would be a misdemeanor under the statute, although I am at present inclined to think it would; yet it is not necessary to the disposing of this case that any decided opinion should be entertained on the point.

HAGARTY, J.—I agree with the learned Chief Justice in his construction of the division court act, and that the bond in this case is one of those which can be seized by a bailiff of that court on executions; it cannot, I think, be said not to be “a security for money,” and at law nothing but money could be recovered on it.

Sec. 261 of C. L. P. Act, Con. Stat. p. 241, authorises the sheriff to seize cheques, bills, notes, bonds, mortgages, specialties or other securities for money of an execution debtor, and may hold such notes, bonds, specialties, &c., as a security for the amount of the execution, and may sue in his own name for the recovery of the sums secured thereby.

It is true that in the case of a bond conditioned for the conveyance of land a difficulty would arise under this authority in enforcing a conveyance, or in obtaining anything but the penalty. But the power given to seize and hold the bond as a security for the amount of the execution might be of most important advantage to an execution creditor.

The absconding debtors' act, sec. 1, directs that a debtor's “property, credits, and effects” may be taken. The writ of

attachment directs a seizure of "all the real and personal property, credits and effects, together with all evidences of title or debts, books of account, vouchers, and papers belonging thereto." Sec. 14 declares that all the property, credits and effects, rights and shares in any association or corporation "of an absconding debtor may be attached in the same manner as they might be seized in execution." Sec. 23 provides for notice being given to any person owing a debt to, or having custody or possession of any property or effects of, any absconding debtor, &c., &c. Sec. 25 directs that if the real and personal property, credits, and effects attached be insufficient to satisfy the executions, the sheriff may sue for and recover from any person indebted to such absconding debtor "the debt, claim, property, or right of action attachable under this act."

This statute would seem to contemplate the attachment of, and so far as practicable the realisation of, all the assets, rights, and credits of the debtor. It is not necessary to enquire how such things when seized can be realised; if they can be seized and held, it may be very important to the interests of creditors in the ultimate realisation of their claims.

We know also that under our insolvent debtor laws a prisoner in execution seeking his discharge would be always compelled to assign over such a bond as this for the benefit of his creditor as an available asset.

The case of *Sims v. Thomas*, 12 A. & E. 526, cited by my brother *Richards*, interprets the somewhat similar words of 13 Elizabeth, ch. 5, as only applicable to such goods and chattels as may be taken in execution, adding that bonds at that time could not be so taken.

I doubt if under our statute law we are right in so narrowing this penal enactment of 22 Vict., ch. 96, sec. 21. The case before us is clearly within the mischief intended to be remedied, and we know that a very large portion of the land of this country is held under these bonds for deeds. The transfer made by this defendant would certainly tend to defraud his creditors, and even if the peculiar interest in the land acquired by this bond could not be seized in exe-

cution, yet if the creditor recover and register his judgment by our Registry Acts, Consol. Stat., page 893, he obtains a charge upon all lands in which the debtor was "seised, possessed, or entitled for any estate or interest whatever at law or in equity," and the judgment creditor was entitled to the same remedies in a court of equity against the lands so charged as he would be entitled to in case the debtor had power to charge the lands, and had by writing under his hand agreed to charge the same with the amount of the judgment debt and interest. Now, if this defendant, holding this bond or contract of sale of the land mentioned, had charged his interest therein, by writing in favour of the creditor, with the judgment debt, the latter, I presume, could in equity enforce and perfect the security against the land, or as judgment creditor obtain same relief and security under the statute without the written charge.

In equity the real estate undergoes a constructive conversion from the date of the contract of sale. The vendor is from that moment a trustee of the land for the purchaser, who is equally a trustee of the purchase money for vendor, This bond would, I presume, be treated as an ordinary contract of sale and purchase, and the judgment creditor by its fraudulent transfer would thus lose the means of recovering his claim.

On the whole, I think that the Crown is entitled to our judgment.

*Per cur.*—Judgment for the Crown,  
*Richards, J.*, dissenting.

See Prideaux on judgments, 25 *et passim* ; Forth v. Duke of Norfolk, 4 Mad. 504.

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## GOODENOUGH V. THE CITY BANK.

*Bill of Exchange—Endorsement of—Bill of lading.*

A. having shipped grain to Oswego, on behalf of one P., to the care of L. W. & Co., draws against it and gives the draft and bill of lading to defendants, with the following endorsement on the latter:—"Deliver to I. & J. Lewis, Oswego, subject to a draft drawn by me at 30 days from the 10th of August for \$2259.10c. Signed per R. A. G., D. E. McL." The defendants discount the former, and upon acceptance thereof hand over the bill of lading to the acceptors, who fail to pay the bill of exchange at maturity.

*Held* that the defendants under the circumstances were not responsible for the loss sustained.

The Declaration stated that the defendants were an incorporated bank carrying on the business of banking at Toronto and elsewhere. That plaintiff being a produce broker, and possessed of 287 barrels of flour, agreed to sell the same to I. & J. Lewis, at Oswego, in the State of New York, for \$2259.10, payable in thirty days from the 10th of August 1857, and plaintiff agreed to deliver the flour to I. & J. Lewis on the due payment of a bill of exchange for the said sum, to be drawn by plaintiff on the said firm of I. & J. Lewis, of which defendants had notice, and thereupon plaintiff drew a bill for \$2259.10 on I. & J. Lewis, at thirty days from date, payable to the order of plaintiff, and plaintiff delivered the said bill to defendants, in order that they might in the ordinary course of their business obtain and procure payment thereof by I. & J. Lewis in consideration of the payment of reasonable commission in that behalf. That plaintiff shipped the flour for Oswego, and *at the request of defendants* consigned the flour to the order of Luther Wright & Co., then being bankers in Oswego, and agents for defendants, in that behalf, and delivered to defendants the bill of lading and requested the defendants to cause the bill of lading and the flour to be delivered to I. & J. Lewis upon the due payment of the said bill of exchange, but not otherwise or before. And defendants accepted the bill of exchange and the bill of lading from the plaintiff for the purpose aforesaid. And thereupon it was the duty of the defendants to retain the bill of lading and flour in their possession, and not to allow I. & J. Lewis to obtain possession thereof until they

paid the bill of exchange. Yet defendants so negligently, &c., that the flour was delivered to I. & J. Lewis before the bill of exchange was paid, and the said bill was afterwards, at the maturity thereof, protested for non-payment, and is still unpaid, and the amount thereof and the flour have been lost to the plaintiff by the negligence of defendants. Second count in trover for 287 barrels of flour, and the plaintiff claims \$3000.

*Pleas*—1. Not guilty. 2. That the agent of the plaintiff delivered the said flour to the said I. & J. Lewis, and that the same never was delivered to the defendants or their agents. 3. That plaintiff did not deliver to defendants, nor did defendants accept, the bill of lading, or cause the bill of lading and the flour therein mentioned to be delivered to the said I. & J. Lewis upon the payment of the said bill of exchange, and not otherwise or before.

At the trial at the last Toronto January assizes, before *Burns, J.*, the plaintiff gave evidence that one Duggan, a customer of his, had 287 barrels of flour in plaintiff's hands for sale as a flour broker. He made a sale to I. & J. Lewis on draft at thirty days, equal to cash. A draft was drawn on Oswego, and the flour was shipped on board the "Brantford" for Oswego, and was insured in the name of the defendants. The bill of lading, dated the 15th of August 1857, was produced. The plaintiff was named therein as owner; the consignees, to order of Luther Wright & Co., Oswego. Marked, Churchville Mills, extra. Pieces, 287. Description, barrels of flour. Endorsed was, "Deliver to Messrs. I. & J. Lewis, Oswego, subject to a draft drawn by me at thirty days, from 10th of August, for \$2259.10." Signed "pro R. A. Goodenough, David E. McLean." This bill of lading, with the policy and the draft, were left with the defendants at Toronto, with whom Duggan had dealings, but the plaintiff had not. The plaintiff did not receive any money from defendants, but the amount of the draft was placed by them at the credit of Duggan. There was no proof that the plaintiff had any previous transactions with Luther Wright & Co.

The plaintiff called a witness named Bundy, of whom he

proposed to ask whether he had not had bill transactions with the bank, and other consignments of flour to Luther Wright & Co., in order to shew that Luther Wright & Co. were agents of the defendants. The learned judge declined to allow this. Bundy then stated that he had had bill transactions with the bank, defendants. That he was acquainted with I. & J. Lewis in August 1857, and their credit was not then good; he would not then have trusted them. He had trusted Lewis' firm, and drew upon them through the bank, but the bank had the security of the produce for the drafts he drew. Lewis' clerk at Oswego gave a receipt for this flour. He said that looking only at the bill of lading he should say he would be entitled to the flour on accepting the draft. (That is, if he were in I. & J. Lewis' position.)

At the same time that plaintiff made the sale to I. & J. Lewis, he addressed a letter to them as follows:—"Toronto, 10th of August 1857. Messrs I. & J. Lewis, I have this day bought for your account 287 barrels, Churchville Mills, extra flour, at \$7.75 F. O. B. Terms, draft thirty days equal to cash. Your obedient servant. Pro R. A. Goodenough. David E. McLean."

The flour was reported by the captain of the "Brantford" in the ordinary way as delivered, subject to the order of Messrs. Wright at Oswego; it was in fact delivered to I. & J. Lewis, who were wharfingers, and were understood to be agents of Wright & Co. at Oswego. The plaintiff afterwards claimed the value of the flour from the owners of the "Brantford."

A letter from the defendants' agent at Toronto was also put in and proved. It was in the following terms:—

"City Bank, Montreal, Toronto branch, 17th August 1857. Luther Wright, Esq., Oswego. Dear Sir—Enclosed I beg to hand you for acceptance, collection, and remittance when paid, R. A. Goodenough's draft on I. & J. Lewis, for \$2259.10 @ 30dd. from the 10th instant, accompanied B. of L. in your favour.

"When all is made satisfactory to you, please deliver the flour. Respectfully yours, T. Woodside, manager, per J. H. Pelan."

Mr Woodside was called, and swore that plaintiff came to him about the draft, and putting the proceeds to the credit of Duggan. The plaintiff named Messrs Wright as the persons to whom he wished the flour to be consigned. The defendants' agents in Oswego were the City Bank, and not Luther Wright & Co. No instructions were given by plaintiff. The flour was handed over on acceptance by I. & J. Lewis, which was the custom, as he (Mr Woodside) understood at the time. That is the custom invariably unless there is special instruction. The plaintiff gave no further instructions than that the draft should be forwarded to Wright. The draft was afterwards accepted and protested for non-payment.

Mr Woodside proved a letter from the plaintiff dated the 23rd of October 1857.

The plaintiff said that he had been to Oswego and made arrangements with I. & J. Lewis, and had taken notes. He brought the notes he had taken from I. & J. Lewis to defendants for discount. Mr Woodside would not discount them, but sent them to Oswego for collection; they were not paid. Mr Woodside stated he did not direct the flour to be insured, nor did defendants in the least look to the property for security. The bill of lading and the insurance were merely for the purpose of showing that the drawer had a right to draw the bill. If the bill had not been accepted, I suppose of course that Wright would have held the property in security. In other cases bills have been drawn, and bills of lading sent to Wright, in the same way that this was done, but in this case the plaintiff named Wright as the person to whom the flour should be consigned.

Mr Angus Cameron, the cashier of the Bank of Toronto, proved that the custom at their bank, and he believed generally, was that the property is not delivered until the bill is paid.

Mr Howland, the president of the Board of Trade in Toronto, stated, that looking at *the plaintiff's letter to I. & J. Lewis*, he should consider the property should be delivered on acceptance of the draft, if there were no instructions given by the consignor, but it is usual to give instructions that the

property be held until payment. If there was nothing more than appeared by the letter, he thought the consignee (vendee is apparently meant, for Luther Wright & Co. were the consignees) was entitled to the flour on acceptance of the draft.

This was the plaintiff's case; the defendants called no witnesses. The learned judge asked the jury—1. Did the flour ever come to the possession of Wright, supposing that Wright was the defendants' agent? The captain of the vessel which carried the flour, and her owners, were the agents of the plaintiff for the carriage of the flour. Then it appeared the flour was delivered to Lewis, whom the master or purser of the vessel thought were the agents of Wright. If the flour did not come to Wright's possession, then the defendants cannot be liable. 2. Was Wright the agent of the defendants in the matter, or of the plaintiff? The learned judge thought the weight of evidence shewed he was not the defendants' agent. 3. The learned judge interpreted the bill of lading and letter to mean that the flour was deliverable upon the acceptance of the draft, and not that the flour should be retained till the draft was paid; and that on this point the verdict should be for defendants.

The jury found for defendants.

In this term *Hector Cameron* obtained a rule *nisi* for a new trial for misdirection—1. That the evidence of Bundy was improperly rejected upon the matters on which the plaintiff's counsel desired to question him. 2. On the defendants' liability as affected by the bill of lading and the letter.

*Galt*, Q. C., shewed cause. The second plea was proved, and put an end to the case. The captain of the steamer was entrusted by plaintiff with the flour, to be delivered to Wright, and he delivered it to I. & J. Lewis as agents for, and to be delivered to Wright, and they kept it. Then as to Bundy's evidence, it was rightly rejected, for he was asked with reference to the manner of defendants' dealings in other transactions, but that could not affect this transaction, all the particulars of which were known. The facts could not be changed by evidence of other facts between other parties, and the law applicable to the facts proved

could not be changed either by such evidence. Lastly, the only construction to be put upon a bill of lading, its endorsement, and the plaintiff's letters to I. & J. Lewis, was that which the learned judge put at the trial.

*Hector Cameron* submitted to the court that these transactions had become of daily occurrence since the last acts respecting incorporated banks. (22 Vic., ch. 20, 1859. Con. Stat. Can. ch. 54, secs. 8 & 9.) He referred to the expression "subject to draft drawn" as going further than subject to the acceptance of a draft, &c., would have gone. The acceptance of the draft left the shipper liable to the contingency, which in this case happened, that it might not be paid, and the delivery subject to a draft shews that the shipper meant to rely on the flour till the draft was honoured, not by mere acceptance, but by payment, for the draft required both. He referred to *Lucas v. Groning*, 7 Taunt. 164. As to the admission of Bundy's evidence, it only became important if the court were with him on the other point. If the court were with him on this point, then he contended he ought to have a new trial, for it cannot be said that the jury decided the question whether Wright was the agent of the plaintiff or of the defendants. They may have found for defendant on the construction put upon the bill of lading and letters by the learned judge.

DRAPER, C. J.—The statutory provisions which, by introducing a new course of dealing in regard to incorporated banks, have given rise to this question, are to the following effect—that any bill of lading (other instruments are also mentioned, but only such parts as refer to bills of lading need now be noticed) given by a master of a vessel for cereal grains, goods, wares, or merchandise, shipped in any vessel for carriage from any place whatever to any part of this province, or through the same, or on the waters bordering thereon, or from the same to any other place whatever, may, by endorsement thereon by the owner of, or person entitled to receive, such cereal grains, goods, wares, or merchandise, or his attorney or agent, be transferred to any incorporated or chartered bank in this province, or to any

person for such bank, or to any private person or persons, as collateral security for the due payment of any bill of exchange or note discounted by such bank in the regular course of its banking business, or any debt due such private person or persons, and being so endorsed shall vest in such bank or private person, from the date of such endorsement, all the right and title of the endorser to or in such cereal grains, &c., subject to the right of the endorser to have the same, &c., transferred to him, if such bill, note, or debt be paid when due ; and in the event of non-payment of such bill, &c., when due, such bank or private person may sell the said cereal grains, &c., and retain the proceeds, or so much thereof as will be equal to the amount due to the bank or private person, upon such bill, note, or debt, with interest and costs, returning the overplus to the endorser ; provided (among other things not applicable here) that no transfer of any such bill of lading shall be made under this act to secure the payment of any bill, note, or debt unless the same be negotiated or contracted at the same time with the endorsement of such bill of lading.

In order to determine whether these provisions have any, and if any what, bearing upon this case, a brief statement of facts may be useful. The plaintiff may, I think, be looked upon as owner of the flour, and he shipped it before the defendants had anything to do with the transaction. This appears to me to be the proper conclusion from McLean's evidence, for after mentioning the sale to Lewis, the drawing the draft on Oswego, and the shipping of the flour, he says the bill of lading produced with the endorsement as it is now, and the draft, were left by me at the City Bank here in Toronto. I understand, however, the plaintiff had been previously at the bank, and some understanding had been come to, to the effect that a draft against the flour was to be sent there and discounted, and the proceeds placed to Duggan's credit, though this is but an inference from Mr Woodside's testimony, and is not gone into or fully explained. The plaintiff seems, however, to have named Luther Wright & Co. to Mr Woodside as the persons *whom he wished* to be the consignees. He then ships it, and takes

a bill of lading, by which, in express terms, the master of the "Brantford" undertakes to deliver the flour to the order of Luther Wright & Co., Oswego. By this he clearly bound himself and his owner, and could only discharge himself and them by a delivery in accordance therewith. Looking at the dealing with I. & J. Lewis, who were to pay for the flour by a bill to be drawn on them by plaintiff, and assuming an intention as between them that the property should not vest in them until at least the bill was accepted, the more usual course, I apprehend, would have been to have taken the bill of lading to deliver to plaintiff's own order, in which case he could have endorsed it to whom and with such directions as he pleased. Such a bill of lading, *i.e.*, to deliver to the order of the shipper, or if no consignee's name had been inserted but it had been to deliver to — or assigns, leaving a blank for the consignee's name, would have been notice that there is something remaining to be done before the master could deliver. But a bill of lading is by the common law, founded on an adoption of mercantile usage, viewed as a negotiable instrument partaking of the character of a bill of exchange, transferable by endorsement when drawn to order, or after blank endorsement by delivery, subject, however, to the right of the stoppage *in transitu* by the consignor—a right which does not affect this case in any way.

But the moment the goods were shipped, and this bill of lading was signed, whatever rights the plaintiff might have either to stop *in transitu*, or to give directions to the consignee as a trustee for him, the plaintiff could exercise no right over the bill of lading, or make any alteration in the undertaking of the master to deliver to the order of Luther Wright & Co. The endorsement by the plaintiff might enure as a direction to Wright & Co., which they as trustees were bound to observe, but it could not, and in its terms does not, pretend to transfer any right or interest in the bill of lading to the defendants, and if not, the case is neither within the spirit or letter of the statute. Not within its spirit, for it is sworn by Mr Woodside that the defendants never in the least looked to the property as security for

the money placed at Duggan's credit, and the bill of lading therefore was not delivered to them as a collateral security for the bill upon I. & J. Lewis, nor within its letter, for the only persons who could endorse, according to its form, were Wright & Co., and they never have endorsed it at all, and if what the plaintiff has written upon it were equivalent to an endorsement, it is not made to the defendants, or to any person for them; and in fact it is not an endorsement within the act, but a direction to the plaintiff's trustee, neither passing nor professing to pass any interest.

It appears to me, therefore, that the statute referred to in the argument has no bearing on the question.

The bill of exchange was, however, discounted by defendants, and this bill of lading, so endorsed by the plaintiff, was beyond doubt in their hands, and it is quite clear they impliedly at least undertook for the transmission of both to Wright & Co. Why they did so is thus answered by Mr Woodside—it was merely for the purpose of affording evidence that the drawer had a right to draw the bill. No other explanation is given of this, or of the fact that an insurance was effected on the flour in the defendants' name. I confess I do not understand the acts of the parties, and cannot help thinking they supposed the effect of what they were doing was different, though how far I cannot tell, from what I deem to be their legal consequences. Mr Woodside's letter certainly implies more than his evidence gives one to understand, for when he sends the bill of lading and the bill of exchange to Wright & Co., he adds, when all is made satisfactory to you, *please to deliver the flour*—in itself a mere reiteration, and in equally or perhaps more vague language, of the direction on the bill of lading endorsed by the plaintiff. I am not satisfied, coupling the plaintiff's letter of advice to I. & J. Lewis, of the purchase with the other facts, that they had not an absolute right to get the flour as soon as they had accepted the bill of exchange which the plaintiff calls "equal to cash." If it were necessary to decide that point now, I should so hold, not as the construction of the words, "Deliver to Messrs I. & J. Lewis, subject to a draft drawn by me," &c., but as being

the proper explanation of the terms of sale, and the direction on the bill of lading not being at variance with those terms, but, on the contrary, to be viewed as an act in confirmation of them, and Wright & Co. being, so far as I can see, a trustee for the plaintiff only, and not for the defendants.

But when it appears from the evidence that Wright & Co. were named by plaintiff himself as consignees, that the flour was to be delivered to their order, and that the endorsement of the bill of lading could operate only as a direction to them from the plaintiff as to the mode in which the consignment was to be dealt with, I am clearly of opinion that the plaintiff has not sustained his declaration. He has not proved that Luther Wright & Co. were agents for the defendants, nor that the flour was consigned to them at defendants' request, expressed or implied, nor that the defendants accepted the bill of lading and the bill of exchange in order that *they* should cause the bill of lading and the flour to be delivered to I. & J. Lewis upon payment of the bill, and not otherwise or sooner. The duty alleged did not therefore arise, and there can consequently be no liability for a breach.

I am of opinion, therefore, that the rule should be discharged, and for the reasons I have expressed, which make it unnecessary to consider the question respecting the rejection of evidence.

*Per cur.*—Rule discharged.

See *Sheridan v. The New Quay Co.*, 4 C.B.N.S. 618.

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### MINGAYE V. BURTON ET AL.

*Bank Committee—Secretary of—Salary.*

*Held* that a party (sued jointly with others as a member of a committee) is not responsible for the salary of a person employed by the committee (under a joint stock banking charter) prior to the time of his becoming a stock-holder in the bank and a member of the committee.

The action was commenced by writ specially endorsed, claiming as follows:—

Salary for plaintiff for services rendered to defendants as secretary and treasurer of the

Union Bank of Canada.....£300 0 0

|   |       |    |   |
|---|-------|----|---|
| Travelling expenses and other disbursements incurred by the plaintiff in the execution of his duties as such secretary and treasurer..... | 71    | 16 | 5 |
| Paid protest and postage.....   | 3     | 8  | 4 |
| Amount of judgment recovered by Jas. M. Morton against plaintiff.....   | 9     | 13 | 9 |
|   | <hr/> |    |   |
|   | £384  | 18 | 6 |
| Less received on account.....   | 36    | 15 | 0 |
|   | <hr/> |    |   |
|   | £348  | 3  | 6 |

One defendant, Richard P. Street, suffered judgment,—the defendants Burton, Baker, and Lawrason appeared, and the plaintiff declared on the common counts against them. Burton & Baker pleaded never indebted and payment. Lawrason pleaded never indebted.

The trial took place at Hamilton during the fall assizes of 1858, before *Hagarty, J.*

By the stat. 19 and 20 Vic. ch. 122 (passed 1st of July 1856), several persons, including the defendants Street, Burton, and Baker, were incorporated as the "Union Bank of Canada," who were authorised as soon as £200,000 of the capital was subscribed, and £50,000 paid in, to proceed to elect directors. The first meeting of the persons named as being incorporated took place on 5th July 1856. At this meeting the defendants Baker, Street, and Burton were present. On the 8th July there was another meeting; the same three defendants with other parties were present, and a committee was named consisting of defendants, Baker, Burton and other persons, who were authorised to engage offices and to appoint a secretary. On the 8th of the same month the defendant Burton wrote a letter to the plaintiff appointing him secretary for one year at £300. It was as follows:—

HAMILTON, 8th July 1856.

George H. Mingaye, Esq.,

DEAR SIR,—I am instructed by the committee of subscribers of the Union Bank of Canada (appointed at a meeting of the corporators held this day) to apprise you that your application for the office of secretary was laid before them,

and I am happy to inform you that you have received the appointment, the engagement being for one year at the salary of £300. As, however, the powers of the committee will cease on the appointment of directors, it must, of course, be understood that your services for the remainder of the stipulated term after their election will be available in any capacity in which they may require them.

(Signed)

GEO. W. BURTON,

*Sec. pro tem.*

On the 17th November 1856 there was another meeting, at which the same three defendants were present, and an executive committee was appointed to complete the necessary arrangements for the organization of the Bank, giving such committee all the powers of the corporators until the appointment of the board of directors. Seven persons were appointed, among them the four defendants are named, but the defendant Lawrason does not appear to have been at the meeting, according to the entry in the minute book. But there was evidence that he was present at a meeting of this committee held on the 22nd November 1856. The plaintiff's demand was as well for services as for disbursements prior and subsequent to this date. It appeared that a charter for the bank was obtained in July 1856, in the form usually granted by the legislature for the incorporation of banks. The plaintiff gave evidence to sustain his claim independently of his salary.

For the defendant Lawrason it was objected that he became a shareholder after the plaintiff's appointment. The plaintiff did not seek to charge Lawrason on the ground that he had taken stock in the bank in July or August 1856, but because he had joined the committee in November, and he contended that made Lawrason liable retrospectively. The learned judge ruled that there was no evidence of a joint liability until Lawrason joined the committee in November. It was further objected that his joining the committee could not make him liable for expenses previously authorised, or incurred afterwards, in pursuance of the previous authority, because the committee of which he was a member was appointed for other purposes. The case was left to the jury to

say whether Lawrason, as a member of this committee, was one of the managing body for whom and on whose credit the plaintiff was giving his services, and if so, to allow the plaintiff for his services from the time that Lawrason joined the other defendants as members of such committee. All the plaintiff's demand, excepting for salary, had accrued before November 1856.

The jury found for plaintiff, £75 damages.

In Michaelmas Term, 22nd Vic., *Cameron*, Q. C., obtained a rule *nisi* for a new trial on the law and evidence. He insisted that Lawrason could not be held liable to the plaintiff, who was engaged under a special agreement, as Mr Burton's letter of the 8th July 1856 shewed. Lawrason had no connexion with this corporation then. Afterwards he took stock and attended one meeting of the committee. The plaintiff was engaged on terms to which Lawrason was no party.

In Hilary Term following *O'Reilly* shewed cause. He referred to Bell and Francis, 9 C. & P. 66; Bartlett and Lambert, 10 Jur. 416; *Hutchison v. Surrey Gaslight, &c., Association*, 11 C. B. 689.

No one has up to this time supported the rule.

DRAPER, C. J.—We should have been able to dispose of this case long ago but for the fact that the exhibits which were produced at the trial were not forwarded with the record, and though repeatedly asked for, it was not until the 17th of last month they were produced to the court.

It is unnecessary to enter into a critical examination of the cases cited by Mr O'Reilly, though I have looked at each of them. The case in the 10 Jurist is reported also in 15 M. & W. 489, under the name of Barnett & Lambert, and is the most in favour of the plaintiff of any which I have seen. But in my opinion the case of *Beale v. Moulds et al.* (10 Q. B. 976) really disposes of the precise question. There the defendants were members of a provisional committee which had entered into a written contract for some machinery before the defendant Moulds joined the committee; under this

contract the plaintiff was to have monthly payments on account while the work was in progress, not exceeding the price of the work done and material supplied for the time being. After Moulds joined the committee, several payments were made on account of the work, and alterations were suggested and adopted with his sanction, and he also took an active part in superintending the work and making experiments with it. The court on a motion on leave reserved to enter a verdict for plaintiff, who had been nonsuited, refused the rule, and held that there was no ground for implying a new contract after Moulds joined the committee, and that his acquiring an interest in the subject-matter of the contract previously entered into, would not make him liable on such contract, and that he was not liable on a count for goods bargained and sold, because if the property, in successive portions of the machinery, while the work was in progress, did pass from time to time by the payments on account, it passed according to the terms of the special contract, to which he was not a party.

Here the plaintiff was engaged, and undertook to serve, as secretary to an inchoate corporation for a year absolutely, for a fixed salary named in one sum, and not payable by any instalments at all. If the defendant Lawrason could be liable at all, he would be liable for the whole year's salary, for even if part, more or less, had been paid, the recovery would be on the footing of the original agreement. There is no evidence whatever of a new contract in fact to which Lawrason was a party, and there can be no ground for *implying* a new contract in this case which did not exist more strongly in the case of Beale and Moulds. The plaintiff does not seek to recover on a special count, but throws himself on the common counts merely. But he puts in evidence the agreement under which he entered into the service, and it is not shewn that it was rescinded by any assent of Lawrason's, from which an implied assumpsit on his part to pay any part of plaintiff's salary can arise.

I think, therefore, the rule should be made absolute.

*Per cur.*—Rule absolute.

See also Bramah & Roberts, 3 Bing., N. C. 963.

## ECKSTEIN V. WHITEHEAD.

*Agent—Fraudulent representation of being—Damages therefor.*

*Held* that a person who induces another to contract with him as the agent of a third party by an unqualified assertion that he is such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue; and

*Held*, further, that costs incurred by such third person for the recovery of damages in an action against the supposed principal may be recovered as damages in an action against such unqualified agent.

The declaration stated that defendant on, &c., was acting and assumed to act as agent of the Buffalo and Lake Huron Railway Company in purchasing the right to take gravel on divers lands, and plaintiff was the owner in fee of part of lot No. 36, 12th concession of Zorra, and defendant represented to him that he was the agent of the said railway company for the purchasing from plaintiff for the said company all the gravel on a portion of the land of the plaintiff, called the East Hill, and fraudulently and falsely represented that he was such agent, and made an agreement with plaintiff whereby plaintiff sold to the railway company all the gravel on the east hill, on said lot 36, 12th concession of Zorra, for the sum of £50 an acre, £50 to be paid at the time of taking possession, and the balance as the gravel should be taken away. The plaintiff to have eight days' notice of taking possession; and that defendant, as agent for the company, had agreed to the sale, and further to level the pit which should be excavated, and to soil it as good as it then was—which agreement was signed and sealed by plaintiff. That defendant afterwards, pretending to be such agent, took possession of the said land and excavated the soil near to the east hill. That defendant was not the agent of the said company, and had no authority to make this agreement for them. That neither the company nor defendant have paid plaintiff anything, nor levelled the pit, nor *soiled* the same. That plaintiff not having notice that defendant was not the agent of the company, commenced a suit against them to recover, &c., and by reason of defendant not being their agent and having no authority to bind them plaintiff failed, and plaintiff has had to pay the company £25 for their costs, and been put to great cost and expense.

2nd count, *qu. cl. freq.*, to the same lot, digging the same, &c.

3rd count, on defendant's covenant to pay £50 at the time of taking possession of plaintiff's land, averring that defendant did take possession.

Pleas, to 1st count, that defendant was the agent of the Buffalo and Lake Huron Railway Company, for the purpose of making the said agreement, and thereby bound the company.

To the 2nd count, that he entered the lands and committed the acts by the leave and license of plaintiff, for the purposes of the agreement in the first count mentioned. To the 3rd count, that defendant did not covenant *modo et forma*. Issues.

The case was tried at Woodstock in October 1859, before *Burns, J.* The plaintiff put in and proved the following agreement:—"This agreement, made this 28th August 1856, witnesseth that Henry Eckstein has this day sold to the Buffalo and Lake Huron Railroad Company all the gravel on the east hill on lot 36, in the 12th concession of Zorra, for the sum of £50 an acre, £50 to be paid down at the taking possession, and the balance as the gravel is taken away—Eckstein to have eight days' notice before taking possession. Joseph Whitehead, as agent of the company, has agreed to the above, and further agrees to level the pit and soil it as good as it is now. Whitehead has to pay also one dollar an acre to Eckstein's wife for her goodwill of the bargain. In witness whereof Eckstein has put his hand and seal for himself, and Whitehead has done the same for the Buffalo and Lake Huron Railroad Company." Signed, Henry Eckstein, [L.S.]; Joseph Whitehead, [L.S.]

The Secretary of the railway company was called as a witness. He said there was nothing to his knowledge on the books or in the papers of the company authorising defendant to make such an agreement. That he believed the company repudiated any such agency of defendant. That defendant was a contractor on the railway, and he was to fulfil his contract, furnishing gravel and materials for the road. As the witness understood, the defendant bought the

gravel pits and paid for them himself. The company did not pay people for the gravel. That plaintiff had sued the company on this agreement and had failed. Other witnesses confirmed this latter statement. One of the subscribing witnesses to the agreement swore that defendant represented himself to be the agent of the railway company. It was proved that defendant went into possession, and had been working on plaintiff's land—unsoiled (took off the surface soil) a good deal; they got no gravel, but a witness said there was gravel there, if they knew where to find it. The plaintiff also gave evidence of the damage done to his land.

A nonsuit was moved for—first, as to 1st count, because there was no evidence of any false pretence, or that plaintiff was misled by false pretences, if there were any. The contract proved shewed that plaintiff could not be misled. There was a total failure of consideration, the contract being to pay for gravel, and there was none.

As to 2nd count, the agreement shewed leave and license.

As to 3rd, the contract in evidence did not prove defendant's covenant to pay.

The learned judge reserved leave to move for a nonsuit on these objections.

On the defence—Donald McDonald swore that defendant made agreements for gravel pits in 1856, as it was not convenient for the company to send a person to make the agreement. Captain Barlow thanked defendant for the trouble he had taken on behalf of the company. The pit bought from plaintiff is one of such agreements, and was as much confirmed as any of the others. The witness was general agent of the company for all land matters, and was authorised to settle with plaintiff. Before going to him he understood the pit was an exhausted one. The witness put his name as a witness to defendant's execution of the contract, in order to get it registered, and it was registered on behalf of the company. Captain Barlow was managing director, and left witness to settle with plaintiff. Witness saw plaintiff when he complained about the matter, and witness made no offer, as he found his intended proposal would not satisfy plaintiff. Witness could not find the agreement, which de-

layed his making an offer to plaintiff. After that witness ceased to have any further connexion with the company. The contract was always sanctioned by Captain Barlow. The witness would have bought the pit as he did others for the company, had time permitted, and for want of time defendant was authorised to do it. On cross-examination he said he knew the company had repudiated most of the contracts, and had acted dishonourably. Another witness stated that so little gravel was found there, on plaintiff's land, that it was not worth taking. Evidence was also given to shew the damages were far less than plaintiff claimed.

The learned judge left it to the jury to say whether the defendant had authority to contract on behalf of the Buffalo and Lake Huron Railway Company so as to bind them; if not, then he directed that the plaintiff was entitled to recover compensation for the injury to his land.

The defendant's counsel asked the learned judge to direct whether if McDonald's testimony was true, the defendant would be so far constituted the agent of the company that they would be compelled in equity to perfect the contract.

The learned judge declined to do so.

The jury gave a verdict for the plaintiff on the first count with £200 damages, and for the defendant on the second and third count.

In Michaelmas Term *Becher*, Q. C., obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial, the verdict being contrary to law and evidence in this, that no fraud, deceit, or false pretence was shewn; that if any were shewn it did not appear that plaintiff was misled thereby, and that he could not have been misled because the contract in evidence did not purport to bind, and could not bind the railway company in law. That there was a failure of consideration for recovery of damages, the contract being for the sale of gravel, and the evidence shewing that there was none. That the plea to the first count was proved, that the verdict was against the judge's charge, and that the damages were excessive. Also that the defendant should have leave to add a plea of not guilty to the first count.

In the following term *Anderson* shewed cause.—The whole issue was on the defendant, namely, whether he was agent of the railway company for the purpose of making a contract; the plaintiff's case was admitted if he was not, so there cannot be a nonsuit. *McDonald v. McMillan*, 17 U. C. Q. B. 377, does not apply, for in that case not guilty was pleaded. This case comes within the principle established in *Collen v. Wright*, 7 E. & B. 301, and again in 8 E. & B. 647 in appeal. The right mode of computing damages was adopted. The only question is as to the costs of suit against the railway company. The amount of these costs, £20, was expressly admitted at the trial, and they are severable therefore. It was not necessary that this contract should be under the seal of the company, or under seal at all, if the defendant had authority under the company's seal to make it. The case also differs from *Randell v. Trimen*, 18 C. B. 786, for in the body of the contract the plaintiff agrees to sell to the railway company, and defendant, "as agent of the company," agrees to the sale and makes further stipulations.

*Becher*, in reply.—As to the costs, the defendant had no notice of the suit against the company, and therefore cannot be liable for them. In this respect the case differs from *Collen v. Wright*. The damages are outrageous on the evidence; the plaintiff's whole farm was not worth the sum. He contended the plea was an argumentative plea of not guilty, and the jury have given their verdict on the ground of deceit, which was not proved. He referred to *Randell v. Trimen* (18 C. B. 786). The 32nd sec. of 19 Vic., ch. 21, enabled the railway company to appoint a managing director or superintendent, with such powers as should be fixed upon by any by-law or resolution of the directors. Captain Barlow was so appointed, and gave authority to buy the gravel pits, and the defendant may insist on the authority derived from him, though the plaintiff has failed in his action against the company. The plaintiff must be assumed to know that the defendant could not bind the company unless by agreement under their seal. *McDonald v. McMillan*, 17 U. C. Q. B. 377. The assent of the company

to the contract made by defendant, and implied by defendant's authority to make it, is shewn by their entry on the land of plaintiff in search of gravel. *Smith v. Birmingham Gas-light Company*, 1 A. & E. 526.

DRAPER, C. J.—I think there is no ground for ordering a nonsuit, for which purpose we must convert the defendant's assertion that he was the agent of the railway company for the purpose of making the agreement declared on, and that he thereby bound the company into an argumentative plea of not guilty. The defendant thereby assumed the affirmative of an issue, which, if he had proved, would have completely answered the declaration, and he admitted all the residue of the declaration. The plaintiff had therefore a right to go to the jury for damages, and was entitled to recover them if the jury decided against the defendant on this issue.

As to the general question arising on the motion for a new trial, the case of *Collen v. Wright* is of the utmost importance. It differs from the present in this respect, that it rests on the foundation of implied contract, not of deceit and false representation; but this is but a difference of the form in which the defendant's liability is asserted; it neither affects the plaintiff's right to compensation, nor the extent to which that compensation is limited; and therefore if we are satisfied the plaintiff could and ought to recover on a declaration in form *ex contractu*, we should scarcely grant a new trial, because the same damages for the same subject-matter have been given in a declaration *ex delicto*, and there has been some failure of proof not affecting the general merits, but regarding only a point of form. That case decided, in the language of *Willes, J.*, in whose opinion the whole court, excepting *Cockburn, C. J.*, concurred, that a person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. The obligation arising in such a case is well

expressed by saying that a person professing to contract as agent for another impliedly, if not expressly, undertakes to or promises the person who enters into such contract upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist. And *Cockburn*, C. J., shows in what light he considered the judgment by saying, "The proposition we are called upon to affirm is, that by the law of England a party making a contract as agent in the name of a principal impliedly contracts with the other contracting party that he has authority from the alleged principal to make the contract, and that if it turns out that he has not this authority he is liable in an action on such implied contract."

The case of *McDonald v. McMillan* (17 U. C. Q. B. 377) is treated by the Court of Queen's Bench as an attempt to carry the principle sustained by such cases as *Randell v. Trimmen* and *Collen v. Wright* further than there is any good ground for. That case is distinguishable from the present on the ground suggested by Mr. *Anderson*, that not guilty was pleaded, and further that the defendant "made no untrue representation of his authority to negotiate on behalf of the railway company;" that "his power to do what he did seems to have been so far conceded by the company that they accepted and paid for 35,000 cords of the wood which the defendant purchased from the plaintiffs in their name." Relying on this distinction, I presume, and on the case of *Smith v. Birmingham Gas-light Company* (1 A. & E. 526) (which does not, however, I think, go the length contended for), Mr. *Becher* argued that the company had acted on this contract by entering on the plaintiff's land. But I think the facts are otherwise. Referring to the learned judge's notes, I find it proved by Mr. *Maclean*, the company's secretary, that the defendant was a contractor on the railway, and was bound to perform and fulfil his contract, *furnishing gravel* and material for the road; that as he (*Maclean*) understood, the defendant bought the gravel pits and paid for them himself; and *Mitchell* swears *the defendant* went into possession, and had men there working taking out gravel; and *McGrath*, another witness, swears that he saw de-

defendant's men at work making a road for the purpose of obtaining the gravel, and made the road into the hill on plaintiff's land, and stripped the soil off to get at the gravel. One place the road ran in nine feet deep; the place was left useless for cultivation afterwards. In the face of this evidence I think it cannot be presumed that the entry and damage was made and committed by the railway company unless the agency of the defendant was distinctly established. As to the allegation that there was no gravel on plaintiff's land, the utmost effect that could be given to that would be in considering damages; it is not pretended that the plaintiff was guilty of any false representation or entered into any warranty. I cannot discover any sufficient proof of defendant's agency to make the verdict on the plea to the first count a verdict against evidence. In my view, the weight of evidence in that respect sustains the verdict; I do not think the jury would have been warranted in a contrary conclusion; the question, so far as a new trial is concerned, is reduced to that of excessive damages. No doubt, on the evidence adduced by defendant, the damages as urged by Mr. Becher appear outrageous, but the evidence on the plaintiff's side is of a very different complexion; the agreement was to pay £50 on entering and taking possession, and to restore the land after removing the gravel to its former condition, levelling or filling up any excavations. Two witnesses estimated the cost of doing this at upwards of \$700. The jury had to decide upon this proof. The only question is as to the costs (£20) of the action brought against the company, as to which, on the best consideration I can give, I think the plaintiff is entitled to retain his verdict. The plaintiff would have been told by the defendant if he had applied to him that he had authority. At least that is the only inference to be drawn from the defendant's subsequent conduct, for he pleads that such is the fact, and he endeavoured at the trial to prove it.

I think therefore the rule should be discharged.

*Per cur.*—Rule discharged.

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## COATSWORTH V. THE CITY OF TORONTO.

*Contract—Condition precedent—Special count.*

Upon a contract extending over several years for work and labour to be paid for by instalments, the defendants admitted part performance of the contract upon which the action was brought, and pleaded general non-performance to the satisfaction of their officer named in the contract, and that thorough and complete performance was a condition precedent to payment.

*Held* that by payment in part they were not barred from claiming full performance, and to the satisfaction, &c., as a condition precedent, the contract being in consideration of performance, and not in consideration of his covenant to perform.

This case came before the court on demurrer to the plea to the first count.

The grounds of demurrer were—1st. That it did not appear that the performance of any part of the agreement of the plaintiff in the said plea set out, and breaches whereof were in the said plea alleged, was a condition precedent to the plaintiff's right to recover on the first count. 2nd. That the sum of £500 which the defendants claim to deduct from the moneys claimed in the declaration was a smaller sum than those moneys, and that the plea, therefore, only answered a part, while it was pleaded to the whole of the first count.

The declaration set out that by certain articles of agreement the plaintiffs agreed with the defendants to well and thoroughly clean and repair for defendants, according to the agreement and specification thereto annexed, during the term of three years from the 1st of April 1854, certain streets in the declaration specified, in consideration of which the defendants covenanted and agreed with plaintiff to pay him, each and every year during the period of three years, the sum of £1,500, by four equal and quarterly payments of £375 each, on the first days of the months of January, April, July, and October. And although plaintiff hath well and truly performed, &c., all and singular the covenants, &c., yet, although there became due from defendants to plaintiff on the 1st of January 1857 £375, defendants have not paid it, or any part. And although there became due the further sum of £375 on the 1st of April 1857, yet defendants have not paid it, or any part.

The plea set forth further particulars and conditions of the agreement declared upon, the last of which was that the whole of the said work should be done thoroughly and faithfully according to the said specifications, and to the entire satisfaction of the chairman of the board of works of the city, or the officer appointed to superintend the said works. Then it negatived in general terms plaintiff's general averment of performance. Then negatived the performance during the period of three years of the first condition as to scraping off mud, &c., from the streets, and complained that plaintiff allowed mud, &c., scraped together to remain on the streets. Negatived the keeping the surface of the streets even rounded from the center or watertight. Negatived the filling up holes and uneven parts, as soon as the mud, &c., was scraped out of them, with stone well and evenly broken according to the agreement. Negatived the employment of a sufficient number of men with tools, horses, carts, and waggons, to clean the streets and remove the scrapings. Affirmed the employment by defendants, according to a stipulation in the contract, of workmen, tools, horses, carts, and waggons, and the necessary expenditure in consequence of, to wit, £500, which they claimed to deduct from any money to which plaintiff might be entitled under the agreement. Negatived the keeping a sufficient quantity of broken stone ready to be used in the repair of the streets. Affirmed that plaintiff encumbered the streets with heaps of broken stone. And that plaintiff allowed sand, gravel, and lake stone to be used contrary to the agreement, and that plaintiff did not perform the work thoroughly and faithfully and to the entire satisfaction of the chairman, or of the officer, &c.

*C. S. Paterson*, for plaintiff, referred to *Millet v. Browne*, 27 Law Jur. Ex. 256; *Pordage v. Cole*, 1 Wm. Sanders 320.

*Eccles*, Q. C., contra, cited *Elliot v. Hewitt*, 11 U. C. 292.

DRAPER, C. J.—I do not think that any one of the aver-

ments, negative or affirmative, contained in the plea affords any answer to the declaration, unless it be the last.

It is to be observed that many of the negative averments in this plea conclude with an affirmative statement that the plaintiff had done something, but incompletely or ineffectually, to amount to performance. As, for example, after negating the employment of a sufficient number of men, it complains that he kept a "few" (meaning "small," I suppose) and insufficient number for the purpose. These concluding statements contain an admission of something done towards the performance of the plaintiff's agreement, but asserting its insufficiency.

I think that upon these pleadings we must take it that a great part of the consideration stated on the face of the agreement has been executed and has been paid for. As the declaration states the defendants' covenant to be, that they will make quarterly payments for three years from the 1st of April 1854, and assigns as breaches the non-payment on the 1st of January and the 1st of April 1857, the presumption is that all the previous quarterly payments had been made. And the plea, which is only an answer to those alleged breaches, appears to me necessarily to involve the admission that the plaintiff was entitled to demand and receive the preceding payments. The assertion of non-performance by the plaintiff appears to me limited to the period for which the claim is set up.

Still the same rule must apply as if the plaintiff were suing at the end of the first quarter for the first sum of £375, and that rule I take to be as expressed in the judgment of *Parke, B.*, in *Graves v. Legg*, 9 Exch. 716, that where a person has received part of the consideration for which he entered into the agreement, it would be unjust that because he had not the whole he should therefore be permitted to enjoy that part without either payment or doing anything for it. Therefore the law obliges him to perform the agreement on his part, leaving him to his remedy to recover any damage he may have sustained in not having received the whole consideration. It is further said that it must appear upon the record that the consideration was

executed in part. In the present case I think the pleadings shew that in reference to the whole period of the agreement they have accepted and paid for all up to the period from which the two last quarters are computed. As to the work to be done within this period, the plea admits a partial imperfect performance, and as I think goes so far as to deprive the defendants of the right to defend themselves on the ground that full performance was a condition precedent.

The stipulation that the work should be done to the satisfaction of the chairman of the city board of works, or of the officer appointed to superintend the works, remains.

In *Morgan v. Birnie* (9 Bing. 672) the agreement was that defendant should pay plaintiff £1250, as follows: three-fourths of the price of the work contracted for upon receiving a certificate in writing signed by defendant's architect testifying the execution of a certain portion of the work, and his approval; a further sum when another part of the work was completed; and the balance within two months after receiving the architect's certificate that the buildings and works had been executed and completed to his satisfaction. The price of alterations or additions was to be added to the sum stipulated for by the agreement, such being first settled by the architect, who was declared sole arbitrator in determining it. The architect's certificate of his satisfaction *as to the mode in which the work had been executed* was held to be a condition precedent to the plaintiff recovering for some additional work not contained in the original contract.

In *Milner v. Field* (5 Exch. 859) the contract was to build thirty houses for the sum of £3130, to be paid by instalments as the works progressed, with a proviso that none of the instalments should be payable unless the plaintiff should deliver to the defendant a certificate signed by the surveyor for the time being of defendant; that the work had been in all respects well and substantially performed according to the specifications and plans. Some instalments had been paid, and the action was brought for the balance. No certificate was obtained, and evidence (under non-assumpsit) was rejected that the certificate was fraudulently with-

held. The plaintiff was nonsuited, and the court refused a rule *nisi* to set it aside.

In *Grafton v. The Eastern Counties Railway Co.* (8 Exch. 699) the plaintiff agreed to furnish the defendant with coke at a fixed price of a specified quality, "and to be to the satisfaction of the said Railway Company's inspecting officer for the time being." First breach, the refusal to accept coke supplied according to the agreement. Second breach, not paying for coke which defendant accepted. The defendants, among other pleas, pleaded to the first breach, that no part of that coke was to the satisfaction of the defendant's inspecting officer. On demurrer the court held the clause to be a condition precedent to the plaintiff's right of action.

*Andrews v. Belfield* (2 C. B. N. S. 779) is in principle somewhat similar, though not strictly applicable to the point under consideration. *Munro v. Butt* (4 Jur. N. S. 1231, 8 E. & B. 738) was the case of a building agreement. Two houses were to be finished in accordance with its terms, with specifications and subject to the approval of the surveyor of the defendant. The third plea was that the houses were not completed and finished to the approval of the surveyor of the defendant. There was also another plea, as to the work being performed by a specified time. The court gave judgment for the defendant without hearing his counsel. The plaintiff went to trial afterwards on the common counts, insisting that the special contract had been mutually abandoned, and a new implied contract to pay for the work done and materials supplied was substituted for it, but he failed there also.

There is also an analogy between such cases and the conditions of an insurance policy against fire, requiring the certificate of the nearest magistrate. See *Worsley v. Wood* (6 T. R. 710). I refer also to *Scott v. Avery*, and *Avery v. Scott* (8 Exch. 486, 497), and to *Brown v. Overbury* (11 Exch. 715).

In one or other of the cases cited it has been determined that it is not necessary to make the condition a condition precedent—that the architect or surveyor should have to

determine price, or the amount to be paid by defendant, nor that his certificate should be in writing. That it makes no difference that the work or material is required to be "to the satisfaction," or subject to the "approval" of the architect, &c. Nor that the stipulated price was to be paid by instalments—nor that a part had been paid, and the suit was only for a balance. The question seems in all cases to have been determined on the language used in the contract, and if tried by that rule there was a condition precedent, the plaintiff could not recover on a count framed on the special contract.

There is much superfluous matter in this plea—much which shews no defence; but on this point it appears to me to furnish an answer to the first count, and therefore that the defendants should have judgment on this demurrer.

I had formed this opinion before the parties agreed that the articles of agreement should be set out *in hæc verba* as part of the plea. It now appears that the defendants' covenant for payment is in the following words:—"And that they, the said parties of the second part, shall, upon the due and faithful performance by the said party of the first part of this contract, and the covenants and agreements herein contained on his part to be done and performed, well and truly pay," &c., as stated in the declaration. This, I think, makes the case as clear as it can be made in the defendants' favour, shewing that they covenanted to pay, in consideration of the *performance* of plaintiff's contract, and not in consideration of his covenant to perform, and that performance as stipulated is a condition precedent to the right to claim payment. The application of the case of *Munro v. Butt* is more decided and pointed than without this statement of the defendants' covenant it appeared to be, and I am confirmed in the opinion I had already adopted.

*Branscombe v. Rowcliffe*, 6 C. B. 523; *Moore v. Woolsey* 4 E. & B. 243; *Taylor v. Brewer*, 1 M. & S. 290; *Bryant v. Flight*, 5 M. & W. 114; *Harrison v. The Great Northern Railway Company*, 11 C. B. 815, 12 C. B. 611; *Dobson v. Hudson*, 1 C. B. N. S. 653; *Northampton Gas Company v. Parnell*, 15 C. B. 630; *Grafton v. E. Counties Railway*

Co., 8 Exch. 699; Kemp v. Rose, 4 Jur. N. S. 919; Munro v. Butt, 4 Jur. N. S. 1231, 8 E. & B. 738; Scott v. Corporation of Liverpool, 4 Jur. N. S. 402; Millett v. Browne, 27 L. J. Exch. 256, and 2 H. & N. 837; Morgan v. Birnie, 9 Bing. 672; Worsley v. Wood, 6 T. R. 710; Milner v. Field, 5 Exch. 829; Andrews v. Belfield, 2 C. B. N. S. 779; Bryant v. Flight, 5 M. & W. 114; Dallman v. King, 4 Bing. N. C. 105; Phelps v. Clift, 5 Jur. N. S. 74; Doe Baker Jones, 2 C. & K. 743; Elliott v. Hewitt, 11 U. C. 292; Graves v. Legge, 9 Exch. 715; Ellen v. Topp, 6 Exch. 441; Stavers v. Curling, 3 Bing. N. C. 369.

HAGARTY, J.—We are told that our first duty is to ascertain if possible the true intention of the parties.

“The rule has been established by a long series of decisions that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when discovered, all technical forms of expression must give way.”—*Tindall, C. J.*, in *Stavers v. Curling*, 3 Bing. N. C. 368.

“No doubt it is competent for the parties, if they think fit, to declare in express terms that any matter shall be a condition precedent, but when they have not so expressed themselves it is necessary for those who construe the instrument to see whether they intended to do it.”—*Tarrabochia v. Hickie*, 1 H. & N. 188.

“All mercantile contracts (on a question of condition precedent) ought to be construed according to their plain meaning to men of sense and understanding, and not according to forced and refined constructions which are intelligible only to lawyers, and scarcely to them.”—*Crockewit v. Fletcher*, 1 H. & N. 911.

In *Morton v. Lamb*, 7 T. R. 130, Lord *Kenyon* says—“Whether covenants be or be not independent of each other must depend on the good sense of the case and the order in which the several things are to be done.”

*Jones v. Barkely*, Doug. 691, Lord *Mansfield* says—

“However transposed covenants might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance.”

Applying such rules as these to this contract, we are to seek to discover by “common sense” what the intentions of the contracting parties were. Plaintiff contracted to clean and repair the streets in a certain specified manner, according to the agreement and the specifications thereto annexed, for three years, with power to an officer of defendants to notify him from time to time to furnish sufficient force to remove dirt, &c., with power to such officer, on plaintiff’s default, to have the work done, and to deduct the expense out of any money then due or thereafter to become due to plaintiff, and to have stone ready for repairs at such points as such officer might point out, “and that the whole of plaintiff’s work should be done thoroughly and faithfully according to the specifications, and to the entire satisfaction of the chairman of the board of works or the officer appointed to superintend the work.”

The defendants contract that they, “*upon the due and faithful performance by the said party of the first part of this contract, and the covenants and agreements herein contained on his part to be done and performed,*” will pay plaintiff £1,500 in each year of the three years by quarterly payments of £375 each, on the 1st day of January, April, July, and October in each year, commencing on 1st of July then next. The plaintiff in his declaration avers general performance of all his covenants. The plea setting forth the whole agreements sets up a number of breaches of plaintiff’s contract, denies that he did the work as he had contracted, avers a necessary expenditure of a large sum by defendants in consequence of plaintiff’s default after notice, and avers that he did not perform the work according to the specifications, and to the satisfaction of the chairman or of the officer in charge as stipulated. The plaintiff admits all this to be true, but insists that it is no answer to his claim for the payments under the contract.

If we place ourselves in the positions of the contracting parties, whom we may reasonably assume to be not very con-

versant with the refinements of dependant and independant covenants, we may I think believe that they considered substantially that the one party was to perform a certain work in a certain specified manner, subject to the approval of a particular officer, and that the other parties were to make certain payments as a reward for the work so to be done and so to be approved of. I hardly think it was contemplated by either party that the work could be left wholly undone, or only one-fourth done, or done in a manner wholly different from that specified, and that defendants were still to pay the sums agreed on, and that their only remedy would be a cross action for breach of contract against the plaintiff, and as to a portion of the work (namely, cleaning and scraping), the right to put on men to do it, and deduct the cost from the payments due or accruing.

It is not unlike the case of an agreement by a plaintiff to erect a house for a defendant on the land of the latter. As in the case before us, all the work has to be done on the defendant's property. The contract is to pay for a certain kind of work, to be directed and approved of by a third person named, to whom the defendants may naturally look to carry out their views and protect their interest. The law does not, as I understand it, raise any obligation to pay for any other kind of work, nor, as has been forcibly put in more than one case, is a man to be obliged to pay for buildings on his property which are of no use to him, and which he would gladly see removed, and which are wholly different from that for which he contracted. *Ellis v. Hamlen*, 3 Taunt. 52; *Munro v. Butt*, 8 E. and Bl. 738. In the vast majority of cases a cross action for damages is a wholly illusory protection.

Having arrived at an opinion as to the apparent intention of the parties, we have to ascertain if the terms of the agreement will enable that intention to be carried out, or, in other words, are the terms used so clear as to defeat such intention, and are the rules of law so well settled as to prevent the performance by the plaintiff of his agreement being a condition of the payments being made by defendants.

It is needless to repeat the rules laid down in *Pordage v. Cole*, 1 Wm. Saunders 320, and numerous other cases.

Certain days are here fixed for the quarterly payments to be made by defendant, the first day of payment being three months from the commencement of the contract. The work to be done by plaintiff is always of a continuing nature, namely, cleaning and scraping of streets and keeping them in repair, &c., and we may fairly infer that no payment was fixed for a day which might arrive prior to any work being required from plaintiff.

The judgment of a court of co-ordinate jurisdiction with this court, and by which we are usually bound, held as follows:—Plaintiff had contracted to do work in a house to be completed on a day named, and for which defendant was to pay £260, at the rate of £50 every three months from a day then past, and a payment of £50 would fall due before the day named for completion, after the whole term had elapsed; it was held necessary for plaintiff to aver a performance of the work in his declaration before he could claim the payment.—*Elliot v. Hewitt*, 11 U. C. Q. B. 293.

*Robinson, C. J.*, says—"Although it is true that defendants were to pay for such work £260, at the rate of £50 every three months, the first of which payments would fall due fifteen days before the work was to be completed, yet when the period has long gone by when the whole work should have been done, and the plaintiff is suing for the whole £260, without, for all that appears, having moved one step towards the fulfilment of his contract, he is not in our opinion in a condition to deny that his doing the work was a condition precedent, because the defendants had undertaken to pay for the work at the rate of £50 every three months, one of which payments might have fallen due while he was going on with the work if he had proceeded with it." This decision (with the substantial justice of which I fully concur) goes far to remove doubts from my mind on this branch of the case.

If the plaintiff's view of the law be correct, I presume he might set out the whole agreement in his declaration, omit any averment of performance on his part, and claim the

amounts agreed to be paid. This is as fair a test as can be applied.

On this branch of the case I refer to a judgment of *Parke, B.*—"Where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract, and an action might be brought for the breach of it without averring performance in the declaration under the old system of pleading, and under the new the denial of such performance would be bad. But the reason, besides the inequality of damages, seems to be that where a person has received part of the consideration for which he entered into the agreement, it would be unjust that because he had not the whole he should therefore be permitted to enjoy that part without either payment or doing anything for it. Mr. Sergeant Williams observes that it must appear on the record that the consideration was executed in part. This may appear by the instrument declared on itself, whereby a valuable right is conveyed, as in *Campbell v. Jones*, or in *Boone v. Eyre*, or by averment in pleading. When that appears it is no longer competent for defendant to insist upon the non-performance of what was originally a condition precedent, and this is more correctly expressed than to say it was not a condition precedent at all."—*Graves v. Legg*, 9 Ex. 716.

Again, *Pollock, C. B.*, speaking of the rule, says—"It cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration and the residue of the consideration has been had by defendant. That residue must be the substantial part of the contract, and if in the case of *Boone v. Eyre* two or three negroes had been accepted, and the equity of redemption not conveyed, we do not apprehend that the plaintiff could have recovered the whole stipulated price, and left the defendant to recover damages for the non-conveyance of it."—*Ellen v. Topp*, 6 Ex. 424.

Lord *Ellenborough* says—"Unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be

considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages.”—*Davidson v. Gwynne*, 12 East. 381.

The plea in the case before us does admit that plaintiff has done some work, but contains very sweeping averments that plaintiff did not do the various duties undertaken by him in accordance with his contract, that he left the piles of filth on the streets, did not keep them scraped, did not keep them repaired or the holes filled up, used wrong materials, &c., and did not work according to specifications or to the satisfaction of the officer named.

The chief difficulty I feel is as to this admission of *some* work being done. According to the plea, the work left undone may certainly be “the substantial part of the contract,” and the non-performance of work contracted to be done in a particular manner, and to the approval of an officer named, although partially done in a different manner and without such approval, can in my judgment be considered as going “to the whole root and consideration” of the contract.

The late case of *Munro v. Butt*, 8 E. & B. 738, goes far to meet this difficulty of partial performance. There the houses were to be built according to specifications, and subject to the approval of defendant’s surveyor. They were built but not approved of, and it was urged that at all events, as defendant had taken possession and was enjoying the benefit of plaintiff’s work, he ought to pay. The judgment of Lord *Campbell* sensibly disposes of all this, and adheres to the wise course of compelling parties to observe their contracts, and not expect to force men to pay for work or services altogether different from that for which they had bargained. *Dobson v. Hudson*, 1 C. B. N. S. 652, seems very much in point, and the wording of the contract, after describing the work and the pay, “the whole to be done to the satisfaction of the Emigration Commissioners,” supports defendant’s view. The satisfaction of the Emigration Commissioners is clearly treated as a condition precedent throughout, and the plaintiff then would certainly not have recovered the stipulated price unless the work done had satisfied those named.

The case of *Moffat v. Dickson*, 13 C. B. 575, is also worthy of note, as to a contract to execute work to be approved of by the defendants.

*Roberts v. Brett*, 18 C. B. 561, confirmed in Exch. Chamber, 28 L. J. 323, May 1859, takes a very rational view of the rule in *Pordage v. Cole*. *Jervis, C. J.*, says—"After all, that rule only professes to give the result of the intention of the parties, whereby you plainly see that it is their intention to rely on the condition and not on the remedy; the performance of the thing is a condition precedent."

The fair result of the very numerous cases seems to be that (as I have already stated) we must endeavour to find out what the parties really meant by the rules of common sense, irrespective of technical rules or words. To the best of my opinion, the plaintiff contemplated that all his work was subject to the approval of defendants' engineer, and was to be done according to certain specified directions; that it was for so doing the work that he was to be paid, and not for doing some other kind of work; and that if he did not so do the work, he was not to be paid. The defendants, I consider, must have reasonably taken the same view, and would justly have been surprised to hear that the legal effect of this contract might be that plaintiff might wholly fail to do the work as agreed, that they must still pay him the large sums agreed on, and their only remedy the doubtful and possibly worthless one of a cross action for damages. This I think would be a most startling result in the face of the words of their contract to pay upon performance by plaintiff of his part of the agreement, and not to pay generally.

I consider that the decision of our Court of Queen's Bench in *Elliot v. Hewitt* disposes of a large portion of the difficulty of this case, and reduces the question in my mind to this—assuming that plaintiff cannot demand payment without performing the work—can he shew his compliance with his contract by averring his performance of a different class of work, or of the same general kind of work or services done in a manner different from that agreed, and not approved of by the officer whose approval was to be obtained.

We know that a century ago this question of dependent or independent covenants was embarrassed with subtleties and refinements. In the year 1744 we find *Willes*, C. J., saying—"I expressed my dislike of these cases, though they are too many to be now over-ruled, where it is determined that the breach of one covenant, though plainly relative to the other, cannot be pleaded in bar to an action brought for the breach of the other, but the other party must be left to bring his action for the breach of the other."—*Thomas v. Cadwallader*, *Willes* 499.

"The judges (says Sergeant *Williams*) seem to have founded their construction of the independency or dependency of covenants or agreements on artificial and subtle distinctions without regarding the intent and meaning of the parties."—1 *Wm. Saund.* 320, A.

A far more satisfactory rule seems at last firmly established, and the manifest intention allowed to prevail over technical expressions.

Having no doubt whatever of the substantial understanding of the parties to this contract, I must decline acceding to the plaintiff's argument, giving him money that it seems clear he never earned, and making defendants pay without receiving that value for their money for which they contracted.

*Per cur.*—Judgment for defendants.

See *Andrews v. Belfield*, 2 C. B. N. S. 779; *Neale v. Ratcliff*, 15 Q. B. 927; *Willis v. De Castro*, 4 C. B. N. S. 216; *Morton v. Lamb*, 7 T. R. 130; *Jones v. Berkley*, *Doug.* 685.

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## COWAN ET AL. V. THE GODERICH NORTHERN GRAVEL ROAD COMPANY.

*Construction of road—Deviation from original line—Liability of company for extra expenses thereby occasioned.*

An agreement is entered into between the G. N. G. R. Co. and W. B. R. & Co. to construct a gravel road at a certain price and on a certain route, which route was afterwards deviated from by the G. & C. Co., and their engineer instructed the plaintiffs (who were the sub-contractors of W. B. R. & Co.) to construct the extra portion created by the deviation.

Upon an action brought by the sub-contractors against the Road Co.

*Held* that it was not maintainable, the company not having contracted with the plaintiffs, and their engineer having no authority to bind the defendants by an agreement with the plaintiffs.

COMMON counts for goods bargained and sold, sold and delivered, work done and materials, money lent, paid, received, and interest and account stated. *Plea*.—Never indebted.

The trial took place in October 1859 at Goderich before *McLean, J.* It appeared that the plaintiffs were sub-contractors under Wilson, Brown, Rowe, & Co., who were the contractors with the defendants for the construction of this road. After this contract had been entered into their engineer suggested a deviation from the line first laid out, which was not approved of, and by desire of the directors the engineer made a plan for a different deviation, according to which the road was actually constructed. The engineer was instructed by defendants to get the road so made, and the plaintiffs made it. In thus making the road there was an extra quantity of work of 2200 yards of excavation and embankment, the price for which was agreed on; the earth had to be carried a considerable distance, perhaps one-fourth of a mile. Defendants collect toll for the use of that part of the road, in common with the rest. The engineer gave plaintiffs a certificate, dated the 28th of September 1858, that they had made extra cutting on the Young's Hill deviation to the amount of 2200 yards at 1<sup>20</sup>/<sub>100</sub>, amounting to £440, exclusive of his sub-contract with Wilson, Rowe & Co. The engineer represented to defendants that there would be more excavation and embankment on the deviation last suggested by him than on the other deviation; but that as it was shorter there would be less right of way to purchase, and therefore it would cost less. Mr Percival was

the first engineer, and suggested the first deviation, and then Mr Molesworth who was examined at the trial was afterwards engineer, and planned the deviation which was followed; and as plaintiffs made the road as sub-contractors of Wilson, Rowe & Co., Mr Molesworth directed them to do the work according to the later deviation, and supposed they would be entitled to the payment of the difference of work in excavation, &c. (The contract and plan were both put in). If Wilson, Rowe & Co. were bound to make the road by Young's Hill according to any route directed by the defendants, they would be entitled to claim payment from defendants, and the engineer gave them a certificate that all the work connected with the road had been completed except something relating to toll-houses. The contract taken by Wilson, Rowe & Co. was at so much per mile, and they paid the sub-contractors according to the certificates they received, but Mr Molesworth did not certify for the contractors for the work now claimed for, as he considered it was extra work, and the defendants would pay plaintiffs for it. A nonsuit was moved for on the ground that there was no privity of contract, express or implied, between plaintiffs and defendants. The learned judge was of opinion the case must go to the jury.

On the defence the president of the Road Co. proved that no deviation had been planned before the contract with Wilson, Rowe & Co. was entered into, but afterwards Molesworth was directed to report what deviation from the straight line he would recommend, and he recommended that which the defendants approved and ordered to be done. The contract is for £750 a mile, including bridging, excavation, embankment, toll-houses, and everything connected with the road. The defendants paid for the right of way at the deviation, but they knew nothing of the arrangements between the contractors and their sub-contractors. The account with the contractors is unsettled; the matter is in Chancery. The defendants never sanctioned the work now claimed for as extra, and never had anything to do with the plaintiffs, and Molesworth had no authority to make any contract respecting this work, or to relieve Wilson, Rowe &

Co. from performing their contract ; and he must have been mistaken (as this witness said) in supposing the company had anything to do with paying plaintiffs for work which Wilson, Rowe & Co. contracted to do.

The jury found for plaintiffs, £110.

In Michaelmas Term, *J. Wilson*, Q. C., obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law and evidence and the judge's charge ; the evidence shewing that the plaintiffs had no cause of action against the defendants, there being no privity of contract between them.

*S. Richards*, Q. C., shewed cause. He contended that the deviations from the line originally marked on the plan were adopted by the defendants, and that they gave authority to Molesworth, their engineer, to make a contract with these plaintiffs to do the work rendered necessary by those deviations.

*C. Robinson*, contra. As to the use of the road which was urged at the trial, the residue of the road could not be used without using this portion of the line deviated from ; and the using the road has nothing to do with the question who was to be paid for the work done in constructing it. The defendants contracted with Wilson, Rowe & Co. to construct the whole road at so much per mile, including cutting and embankment. The charge agreed to by the company was with reference to this contract, and in effect incorporated with it. The plaintiffs were sub-contractors under Wilson, Rowe & Co., and seeing them at work on this part of the line was no more than seeing them work on any other. The engineer's statement or directions amounted to nothing unless he had authority. The president of the company could not of his own will have done so.—*McLean v. Town Council of Brantford*, 16 U. C. Q. B. 347 ; *Homersham v. Waterworks Co.*, 6 Exch. 137.

DRAPER, C. J.—I think the verdict is wrong. The defendants are liable on their contract with Wilson, Rowe & Co., and this work comes clearly within that contract. Any

deviation that was authorised was as between the defendants and *their* contractors, and these plaintiffs are not the contractors with the defendants, but sub-contractors with Wilson, Rowe & Co. The engineer had no authority to separate this portion of the line from the whole contract, and to make the defendants liable for it on different terms and to different parties—in fact to make a new agreement. There should be a new trial without costs.

Rule absolute accordingly.

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### RUTTAN V. BEAMISH.

*Chattel mortgage—Possession—Right of mortgagor to remain in till default—How far the jus tertii can be set up in an action by the mortgagor v. the mortgagee.*

The plaintiff mortgaged his goods to A., to whom the defendant was administratrix. The goods came into the possession of defendant, but under what circumstances did not appear. The mortgage contained an *agrément* that on default the mortgagee might take possession, and a statement that a delivery of possession was given at the time of executing the mortgage. There was no evidence that the mortgage money had been paid. The plaintiff afterwards executed three other mortgages of the same goods to other parties, each containing a similar agreement upon default, and a similar statement as to delivery of possession. *Held* that the plaintiff, under these circumstances, could not recover either in *trover* or *detinue*, and that the defendant might as against him set up the right of the other mortgagees.

The declaration contained two counts, one in *detinue*, the other in *trover*.

*Pleas* to the first count, *non detinet* and goods not plaintiff's. To the second count, not guilty and goods not plaintiff's.

At the trial at Cobourg in November 1859, before *Hagarty*, J., the plaintiff gave evidence of property in the goods, of their value, and that on demand the defendant had refused to give them up. On the defence were proved—1st. A chattel mortgage from the plaintiff to John S. Beamish (who died about a year and a-half before the trial, and whose administratrix the defendant was) of the goods in question, to secure payment of £100 in one year from the 23rd of June 1855, which was the day of the date. This was filed in the office of the clerk of the county court on the 23rd of June 1855, but not re-filed. 2nd. A

chattel mortgage, dated the 6th of February 1858, from plaintiff to Henry Ruttan, Esq., of the goods and chattels specified in the former mortgage, "now in the possession of the executors or representatives of the said John S. Beamish," to secure payment of £250 in one year from the date, filed on the 6th of February 1858, and not refiled. 3rd. A chattel mortgage, dated the 10th of February 1859, from plaintiff to Henry Jones Ruttan, of the same goods, referring to them as specified in the mortgage to John S. Beamish, and as now in the possession of Margaret Beamish, administratrix of the goods and effects of the said J. S. Beamish, deceased, to secure payment of £100 in one year, filed in the office, &c., on the 10th of February 1859. 4th. A chattel mortgage, dated 14th of February 1859, from plaintiff to Henry Ruttan, Esquire, of the same goods, described almost verbatim as in the last preceding chattel mortgage, to secure payment of £300 in one year.

The chattel mortgage to John S. Beamish authorised him, his executors, &c., on default of payment, to take possession of all the goods, &c., and to sell, or to hold, possess, and enjoy, without the let, molestation, &c., of the plaintiff, his executors, administrators, or assigns. And the last clause in it stated that plaintiff hath put John S. Beamish in full possession of the said goods and chattels by delivering to (a blank), in the name of all the said goods and chattels, at the sealing and delivery thereof. Each of the other three mortgages contain similar forms for the mortgagee to take possession on default, and to sell, or to hold, possess, &c., and each contained a statement that the plaintiff has put the mortgagee into possession by delivering to him "these presents," *i.e.*, the chattel mortgage. In none of them was there any right reserved in express terms for the mortgagor to retain possession, nor yet by implication, unless it arises from the power given to the mortgagee on default to take possession. On the first demand made upon defendant to give up the goods, she refused, saying the plaintiff was indebted to her. On another occasion she said she would not give them up unless advised by her legal adviser. No evidence was offered that the debt due by plaintiff to John S. Beamish was paid.

For plaintiff it was objected that defendant could not set up the *jus tertii*, could not avail herself of the three subsequent mortgages. That the 2nd and 3rd of them (the 3rd and 4th set out above) were not yet due, and that until default plaintiff was entitled to possession. The learned judge decided that the *jus tertii* might be set up, and then the plaintiff elected to be nonsuited, with leave to move rather than to allow a verdict for defendant, with leave to plaintiff to move to enter it for himself for nominal damages, which was all that in the learned judge's opinion the plaintiff could recover.

In Michaelmas Term *C. S. Paterson* obtained a rule *nisi* to set aside the nonsuit, on the ground that plaintiff was entitled to recover notwithstanding the mortgages proved, and that the defendant had not the right to set up the *jus tertii*.

During this term *Cameron*, Q.C., shewed cause.

*C. Paterson*, in reply, urged that the mortgagees in the other mortgages had not claimed possession of the goods, and therefore the plaintiff had a right to them, or to their value. He cited *Ogle v. Atkinson*, 5 Taunt, 759; *Butler v. Hobson*, 4 Bing, N.C. 290; *Isaac v. Belcher*, 5 M. & W. 139; *Carne v. Brice*, 7 M. & W. 183; *Chase v. Gobla*, 2 M. & G. 930; *Leake v. Loveday*, 4 M. & G. 972; *Newnham v. Stevenson*, 10 C. B. 713; 13 C. B. 285, S.C., in error, approves the judgment of C. B. in the facts then before it. *Jeffries v. G. W. Railway Co.*, 5 E. & B. 802; *Mason v. Farnell*, 12 M. & W. 674; *Freshney v. Carrick*, 1 H. & N. 653; *Thorne v. Tilbury*, 3 H. & N. 534; *Sheridan v. The New Quay Co.*, 4 C. B. N. S. 618; *Wilson v. Anderton*, 1 B. & Ad. 450; *Wakefield v. Lynn*, 5 C. Pl., U. C. 410.

DRAPER, C. J.—I am of opinion this rule must be discharged. We have already decided in this court, in *Porter v. Flintoff*, that if in a chattel mortgage there is no covenant, that the mortgagor shall remain in possession until default, yet, though such mortgagor remains in possession,

the application of the rule that possession follows the property whenever the right of possession is in the owner is not prevented. As stated by *Parke, J.*, in *Dixon v. Yates* (5 B. & A. 340), the sale of a specific chattel passes the property in it to the vendee without delivery. The plaintiff therefore had no right to the possession of these goods after executing the two last chattel mortgages, if it was open to the defendant to raise that defence.

I think the defendant had that right. Here the defendant was in possession of these goods at the time the plaintiff claimed the possession, and also at the time of his executing each of the last three chattel mortgages, for he refers to the goods as being in the defendant's possession, and these mortgages not only contained no covenant that he shall retain possession, but in each of them he declares that by a symbolical delivery he has transferred the possession to the respective mortgagees. I concede that if it had appeared that the plaintiff had been in possession, and that the defendant had asserted a right under the mortgage to her intestate, and had taken the goods for which the plaintiff had sued her; she would not have been allowed to set up the *jus tertii*; but this is a different case, and I think the authorities shew that she may defend her possession as against the plaintiff, and on these pleadings, by shewing that the plaintiff has no property or right of possession, because such rights are vested in third parties. She has done nothing to prevent her setting up that defence (*Leake v. Loveday*, 4 M. & G. 972, per *Coltman, J.*)—*Phillips v. Robinson*, 4 Bing. 106; *Thorne v. Tilbury*, 3 H. & N. 534.

It does not appear on the learned judge's notes when or how the goods came into the possession of the defendant. The intestate, her husband, had under the chattel mortgage to him a right to the possession immediately, and on default a right to make them his own. If he got possession of the goods under either of those rights, or held them thereunder, the re-filing the chattel mortgage would be unimportant, and it does not appear that the money secured by that mortgage has ever been paid. And it might well be questioned whether the plaintiff could recover in the face

of that mortgage on two grounds. First—the 12 Vic., ch. 74, only avoids chattel mortgages as against creditors or subsequent *bonâ fide* purchasers or mortgagees, not against the mortgagor himself. Second—the plaintiff in that mortgage professes to have put the mortgagee into full possession of the chattels. He surely must shew he has satisfied the debt before he can make the administratrix of the mortgagee a wrong-doer by detaining the goods from him. But as to the greater part of the goods therein mentioned, they are not included in the three later mortgages, perhaps not any of them.

On the ground first stated, however, the rule must be discharged.

*Per Cur.*—Rule discharged.

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### McFEE v. DUNDAR.

*School taxes—Division of townships into school sections—Alteration of same.*

Under the statute 7 Vic. ch. 29, sec. 14, 24, the township council and not the *district* council had authority to sanction any alteration made in school districts. A proposed alteration being submitted by the superintendent of schools to the district council—was *held* not to legalise the alteration thereby proposed.

REPLEVIN.—Avowry that plaintiff for eighteen months next before the 1st of January 1856 was a freeholder and resident within school section No. 6, in the township of Pilkington, liable to be assessed for school rates, and was duly assessed to pay £1, 6s. 7d. as school rates for the said section for the twelve months ending the 31st of December 1856. That before the said time when, &c., and at the time of signing the warrant hereafter mentioned, Michael Coady, George Bain, and the defendant were the duly elected trustees of the said school section No. 6; that on the 15th of December 1856 defendant was collector of the said school rates, that the said M. C. & G. B., a majority of the trustees, on the said 15th of December issued a warrant under their hands, directed to defendant as collector, and annexed

thereto a list of all the persons rated, and delivered the list and warrant to defendant, by which warrant and list setting out authority to distrain upon plaintiff's goods for £1, 6s. 7d. That defendant required plaintiff to pay him the said sum, but plaintiff refused, and thereupon defendant, by virtue of the warrant and list within the said school section, took and detained the said goods as a distress for the said rate, wherefore he prays judgment and a return.

*Pleas to the avowry.*—1. That the said place in which, &c., was, and is still, a part of union school section, formed of sections No. 9 of the township of Woolwich, and No. 4 of the township of Nichol, without this that the goods and chattels were at the said line when, &c., in school section No. 6 of the township of Pilkington. 2d. That plaintiff was a resident freeholder and householder in and occupied lot No. 17, 2nd concession of Pilkington; that before and until the passing of the act 14 & 15 Vict., intitled "An act to make certain alterations in the territorial division of Upper Canada," the said lot No. 17 formed and was part of union school section in the first plea mentioned, and plaintiff was assessed for school rates in said section in respect of such land and residence. That neither before nor since the passing of that act was there any notice given to the freeholders or householders of said section to consider the necessity of altering said section, nor was there ever any alteration thereof, but the same is unaltered, and plaintiff is liable to taxation therein, and not in said supposed section No. 6. 3rd. That the said place in which, &c., was, and still is, for all purposes of such sale in said avowry mentioned, within the limits of section No. 4 of the township of Nichol. 4. *De injuria.* Issues on all the pleas.

The trial took place in November last, at Guelph, before *Burns, J.* The defendant in support of his avowry proved a by-law of the township council of Pilkington passed on the 18th of December 1852, defining school sections in that township. It created six sections, and as to section six it declared that section should consist of lots Nos. 13, 14, 15, 16, 17, 18, and a gore, in all the five concessions, and that James Mutrie shall be convener of the first meeting. On

the 2nd of September 1853, the trustees of that section memorialised the township council that the section might be assessed for building a school-house. Several rate-payers of the section signed this memorial. Pilkington was a new township at the time of passing this by-law, under the statute 14 & 15 Vict. ch. 5, the 14th section of which enacted that the several tracts of land mentioned in the schedule D. to that act should respectively form new townships by the names assigned to them respectively in the said schedule. There is a proviso to this section as to cases where any portion of a township is detached by the act, or where any township is by the act divided into two or more townships, and as to two townships being united, but there is no allusion whatever to school sections. Schedule D. contains "Pilkington, which shall include and consist of that part of the present township of Woolwich known as the Pilkington tract." In schedule E. to the same act, headed tracts detached from township and attached to others, is, "That part of the present township of Nichol, known as the town plot and village of Elora, shall be detached from the present township of Nichol, and be annexed to and form part of the township of Pilkington." The act came into force on the 1st of January 1852.

James Mutrie, who was named in the by-law, proved the holding of the school meeting in pursuance thereof, and the election of trustees thereat, and that the plaintiff resided within that section. He said he had heard of a school section No. 9. That there were schools in Nichol, but he never heard of a union. That plaintiff paid no school rates before 1853.

Alex. Masson proved he was at the same meeting, that notices of it were posted up. That afterwards a site was purchased and a school-house built thereon, and the section was rated in 1854. He was not aware of the union of school section No. 9 with any section in Nichol.

Edward Passmore proved that he lived within the limits of school section No. 6, and was a member of the township council in 1852. They paid no school rates until Pilkington was erected as a township. There was a school in Nichol,

said to be theirs, but on enquiry he could find no bounds or particulars about it.

Michael Kerby proved that he sent children to the school in Nichol, and paid what he was called on to pay, but he remembered no school rates until after 1853. Never heard of school section No. 9 of Woolwich.

All the foregoing witnesses had lived years in Pilkington.

John Beaty proved that he was a resident of Nichol. There were inhabitants of Woolwich who sent children to school in Nichol. The school section in Nichol was No. 4, but he knew of no union.

Michael Coady proved he was trustee of the section No. 6 in Pilkington for 1854, '5, '6, and rated the section in 1856, and rated the plaintiff among the others. Defendant was collector. The warrant and list mentioned in the avowry were proved by this witness. He used to live in Nichol; people of Woolwich sent children there; he understood it was a separate school for Nichol, and a common school for Woolwich.

A second memorial to the township council in 1855 was produced, with plaintiff's name to it, but his signature was not proved. It was said he could not write.

For the defence:—

James Dow proved he was superintendent of schools in 1846, and for three years; understood there was a union between Woolwich and Nichol before he came into office, and he continued the union and paid them their proportion of the public money. Rates were collected. It was sec. 9 in Woolwich, and he thought sec. 4 in Nichol. In 1845 he made a report to the warden and council of the Wellington district that he had been induced to make some alterations in the several school districts in the township of Woolwich, and laid a statement thereof before them, "trusting that you will give it your deliberate consideration." Among the school districts was "District No. 9, commencing at and including lot No. 12, thence to the boundary line of Guelph, thence to the boundary line of Nichol, thence to the line of school district No. 8, thence to the place of commencement. *This district is to be united to district No. —, in the town-*

*ship of Nichol.* No alteration has been made in this." So long as he continued in office they were united. He was appointed in 1845. He thought the county council sanctioned his recommendation.

Alex. D. Ferrier proved that Dow's report was confirmed on the 13th of August 1845. That there were two schools in section No. 4 (Nichol). There was a separate school on the roadside, and that was the one which in 1845 was united with Woolwich, but the common school in section No. 4 was never united with Woolwich. This separate school never had any number. The adoption of the report of Mr. Dow by the county council amounted to nothing, because it required the assent of both parties or townships.

Patrick Dumphy proved he was a union school trustee at one time between Pilkington and Nichol, not the separate school but a union school section; used to live in the Pilkington section; thought the township council usurped authority in making the division. Did not know how the union was effected. It took in all that part of Pilkington now forming No. 6. He was elected trustee in 1853. He was present at the meeting in 1853 which Mutrie convened under the by-law, and acted as secretary, and took minutes of what was done. He said, "We held a meeting in the union school house before the other, and then we went to the other." He went to this meeting to try and find out by what authority they held it, but could not.

Bernard McArdle proved that he did live in Woolwich, was a school trustee when Mr. Clifford taught in the Nichol section. There were trustees for Woolwich, and trustees in Nichol, and were united. It was always known as a union school section.

Thomas O'Brien proved he was a trustee of this union school section. He never heard of any notice for the township council to act upon.

John D. Green proved he went to live in Pilkington in 1850 (then Woolwich). Knew of no other school section then than the union of No. 9 of Pilkington (Woolwich), and No. 4 of Nichol. Never heard of any notice that the township council meant to make a change. This has always been the dispute.

Thomas O'Brien also said he remembered a meeting to ascertain whether the people would continue the union. The majority decided it should continue.

The learned judge asked the jury to say—1st. Whether there was a union school section existing between the part of Woolwich, now Pilkington, in question, and school section No. 4 in the township of Nichol, before the 18th December 1852. 2nd. Whether the inhabitants of the section in Woolwich had any notice of the intention to pass the by-law. The jury found there was no union school section before the 18th of December 1852, and that no notice of passing the by-law was given, and a verdict was entered for the defendant on the first, third, and fourth issues, and for the plaintiff on the second.

*M. C. Cameron*, in Michaelmas Term, obtained a rule to shew cause why the *postea* should not be delivered to the plaintiff, the finding of the jury on the second issue being virtually a finding against the defendant on the substantial cause of action, or for judgment *non obstante veredicto* on the 1st, 3d, and 4th pleas, or for a new trial, the finding on those pleas being contrary to law and evidence, and the weight of evidence in this, that the evidence shewed that No. 9 in Woolwich and No. 4 in Nichol were united, that plaintiff was a resident of such united school section, and that the union has not been lawfully changed.

*Palmer* in the following term shewed cause. This is an indirect attempt to destroy a by-law that has been in force since December 1852. The jury have on the evidence determined there was no such union school section as the plaintiff pretends; they also determined there was no notice of any intention on the part of the township council to change it. The first finding made the second inevitable, as there could be no notice to change that which did not exist. If there was no union school section the plaintiff fails, for the township council had then clear authority to divide the new township into school sections. The creation of a new township, as this was done, abrogated everything, which simply affected the rights and obligations which arose from

its having been part of another township. The care the legislature took to preserve certain of the obligations, and to provide for their arrangement, supports the argument that but for such provisions these would not have continued. He cited *Gillies v. Wood*, 13 U. C. Q. B. 357; *Ness v. Township of Saltfleet*, 13 U. C. Q. B. 408; *Spry v. McKenzie*, 18 U. C. Q. B. 161; *Barclay v. Municipality of Darlington*, 5 U. C. C. P. 432; *Hill v. Municipality of Tecumseth*, 6 U. C. C. P. 297; *Haacke v. Marr*, 8 U. C. C. P. 441.

*M. C. Cameron*, contra, insisted there was sufficient evidence to establish that this was a union school section. He referred to 13 & 14 Vict. ch. 48, sec. 1, as continuing things in the state they were at the time that act was passed. He insisted also that this case was one in which the township council could not make the change without notice to the parties interested, and therefore the finding there was no notice entitled the plaintiff to a verdict or judgment on the whole record, citing *Hart v. Municipality of Vespra*, 16 Q. B. U. C. 32; and he argued that the statute 14 & 15 Vict. ch. 5, did not affect the existing school sections.

DRAPER, C. J.—I gather from the evidence that school section No. 6 has been in existence and kept in operation by the election of trustees, &c., &c., ever since the passing of the by-law in December 1852; but that the plaintiff and some few others have been opposing its operation by passive resistance, at least refusing to pay school rates, &c. It does not appear that in the meantime the plaintiff has been paying school rates in and for the union school section within which he claims to be resident, or that, excepting in 1853, any trustees have been elected in and for the Pilkington portion of that school section, or that any rates have been imposed or collected, or that the inhabitants of the Pilkington portion have in any way contributed to the support and maintenance of the union common school. But the plaintiff and those who act with him are alleging the existence of the union school section to protect them from paying anything for the support of a common school. No application was made that we hear of to quash the by-law, though its

existence must have become known by the calling of the meeting in 1853 to elect trustees under its authority.

In this view, which certainly is sustained by the evidence as far as it goes, the plaintiff does not appear before us in a favourable light. Whatever his legal rights are must be strictly accorded to him, but if he has to invoke the discretionary assistance of the court his case discloses nothing to entitle him to it.

The two questions left by the learned judge to the jury involve the whole merits of this case. 1. Whether there was a union school section existing between the part of Woolwich (afterwards Pilkington) in question and school section No. 4 in the township of Nichol before the 18th December 1852?

2. Whether the inhabitants of that part of such union section, if it existed, had notice of the intention to alter the same by the by-law?

If the first question is answered negatively, the second is of no importance; it involves only the costs of that issue.

The jury have answered the first question negatively, but it is contended their finding is against law and evidence, or against the weight of evidence. To determine that, the enquiry seems to be, what steps and what authority were requisite to be taken and employed to constitute such a school section.

The power of forming school districts, since called school sections, out of parts of two or more adjoining townships, was by the 7th Vic., ch. 29, secs. 14 & 24, vested in the township superintendents of schools, subject to the approval of the township councils, and the superintendents of schools for each township were to regulate such school.

This was the law from December 1843 to May 1846.

The 9th Vic., ch. 20, sec. 9, gave the district councils power to cause each township, or parts of adjoining townships, to be divided into a convenient number of school sections, and to alter the same.

This act introduced the term school sections. It was repealed by 12 Vic., ch. 83, which came into force on the 1st January 1850. By sec. 17 all divisions of townships

*previously established and then existing*, and called school sections, were continued as school sections until altered according to that act, which alteration by sec. 18 might be made by the township council, who were also authorised to make a new division of the township into school sections, and to unite two or more such sections. By sec. 43 two or more adjoining school sections, which were severally situated in two or more adjoining townships, might, with the concurrence of all the townships affected, be constituted into one school section. Sec. 44 contains the first use of the phrase "Union School Section." This act was repealed on the 24th of July 1850 by the 13th and 14th Vic., ch. 48. The third proviso of the first section enacts that all school sections or other school divisions, together with all elections and appointments to office, all agreements, contracts, assessments, and rate bills, *made under the authority of the said acts*, 7th Vic., ch. 29, and 12th Vic., ch. 83, or of any preceding act, and not annulled by the said act or this act, shall be valid and in full force, and so continue until altered, &c., according to this act.

The evidence of the existence of this union school section is to be found in a sort of general reputation, and in the statements of Mr. Dow and Mr. Ferrier, who proved all the official acts that were proved as to its creation.

As to the first, I attach very little value to such statements, as "I always understood this was a union school section," or "I never knew of any other than this united school," or "I knew of no other school section there than the union of No. 9 of Woolwich and No. 4 of Nichol." They are in my judgment wholly insufficient by themselves to establish the existence of such a section, the authority to create which is granted by statute. Whatever they were worth, however, they were left to the jury, who treated them as inconclusive and insufficient.

Then as to Mr. Dow's evidence, he was superintendent, *township* superintendent, for three years. The three years, therefore, must have been before the 1st January 1847, because under the 9th Vic., ch. 20, which was passed and partly came into force on the 23d of May 1846, there were

no township superintendents. Whatever he did therefore was under the school act of 7th Vict., ch. 29. Now, he proves a report made in 1845 to the *district* council of the district of Wellington, in his character of school superintendent for the township of Woolwich, which the district council had no authority to deal with or confirm; for the approval of the township councils was requisite under the act, and there is no evidence that the question was ever submitted to them, or that their sanction was ever given. Neither the council of Woolwich or Nichol, so far as is proved, were consulted, and the evidence of Mr. Ferrier, then one of the township council of Nichol, shews this, and that he was aware the district council had no authority in the matter. Thus, then, the evidence as to the official acts relied on for the creation of this school section fails.

But it was urged that under the 3rd proviso of the 1st section of the 13th & 14th Vict., this union section, then existing *de facto*, is made valid and continued in full force. There is somewhat of the "*petitio principii*" in this argument, for the evidence I think falls short of establishing the existence *de facto*, and the verdict of the jury denies it, though they had all the evidence of Mr. Dow before them. I think, however, that to come within this proviso it was as necessary to shew that this section was erected "under the authority" of the preceding acts or some of them, as it would be to shew that an agreement or contract, a rate or assessment which those acts, if duly followed, would authorise, was in fact made under such authority in order to its having a continued and binding validity under the act 13th & 14th Vic.; and as the evidence fails to establish this proposition in regard to the school section in question, I think this proviso will not help.

On the whole, therefore, I think the rule for new trial as to the first, third, and fourth issues should be discharged. And as to directing that the *postea* should be given to the plaintiff, or that he should have judgment *non obstante veridicto* because of the finding in his favour on the second issue, I think the rule should also be discharged, for if there was no such union school section, the provision of

notice to those who would be affected by its alteration has nothing to apply to.

Rule discharged.

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SCANLAN V. McDONOUGH.

*Costs—Attorney and client—The amount of the verdict governs them.*

*Held* that a party who gave instructions to commence an action without specifying the court (the attorney not stating that he would expect him to pay the difference should the verdict be within the county court jurisdiction, and commencing the action in the superior court) was only liable for county court costs between attorney and client, the sum recovered being within the jurisdiction of the county court, and no higher costs being taxable between party and party.

*McCarthy*, in Michaelmas Term, obtained a rule calling upon the plaintiff and defendant to shew cause on the first day of the following term why the order of *McLean*, J., discharging a summons granted in this cause, dated the 23rd of May 1859, and which called upon the plaintiff and defendant to shew cause why the taxation of the costs of the plaintiff's attorney as between attorney and client, had upon the order of *McLean*, J., dated the 11th of May 1857, should not be reviewed, and why the taxation of these costs should not be revised, upon the ground that the master taxed the said costs upon the scale of county court costs, instead of the scale of Queen's Bench or full costs, as he should have done; the said costs being taxed as between attorney and client, and upon grounds disclosed in affidavits and papers filed.

On the 11th of February 1859, *McLean*, J., made an order that the plaintiff should enter satisfaction on the roll in this cause, upon payment by the defendant of the costs of the plaintiff's attorney, to be taxed between attorney and client, and upon defendant's acknowledging satisfaction on the roll in the county court of the United Counties of York and Peel, in the action in which the now defendant was plaintiff, and the now plaintiff was defendant, to the amount of the judgment therein which should remain after deducting the said costs.

At the trial of this cause the plaintiff recovered £40 damages. The action was for malicious arrest. The pre-

siding judge refused a certificate for costs, and the master in taxing the costs under the order of the 11th of May 1859 only allowed county court costs to the plaintiff's attorney in taxing the bill between him and his client. The ground upon which this application was rested is, that the plaintiff's instructions for instituting this suit were simply to commence the action, without designating in what court he wished the action to be brought; that he was afterwards aware the action was brought in one of the superior courts, and attended the trials, but had not expressed any dissatisfaction that the action was brought in this court.

*C. S. Paterson* shewed cause to the rule, citing *Allison v. Rayner*, 7 B. & C. 441.

*McCarthy*, in support of rule, citing *Matchett v. Parkes*, 9 M. & W. 768; *Evans v. Taylor*, 2 Dowl. P. C. 349; *Jones v. Roberts*, 2 Dowl. 656.

DRAPER, C. J.—I am of opinion that the order of the 11th of February 1859 may fairly receive this construction, that the defendant should pay the plaintiff's costs of this cause, taxed as between attorney and client on that scale on which the same costs ought according to law to be taxed between party and party. The learned judge who made the order has put that construction upon it, and I see no sufficient reason to differ from him.

In granting such a set-off the court are acting in the exercise of its equitable jurisdiction, and on that account the relief is not granted without recognising the lien which the attorney may have. But we are not called upon to decide that such lien for costs extends farther than to such costs as from the nature of the case appear to be due. If, indeed, the plaintiff had been informed that by bringing the action in the superior court he incurred the risk of recovering a verdict, which would only entitle him to county court costs, and nevertheless directed the action to be brought in this court, he would be liable to pay his attorney's costs accordingly, whatever he might recover, or if he failed altogether; but that is not shewn to be the case; all we see is, that he gave no

direction in that respect, and when aware that the suit was being carried on in this court, expressed no dissatisfaction. I have little doubt that in reality he knew nothing about the consequences, or the difference, and this is no case to apply the maxim *ignorantia juris non excusat*. He might reasonably expect his attorney to inform him. In the state of facts which appear before us, therefore, I am of opinion this rule should be discharged.

*Per cur.*—Rule discharged without costs.

See *Simpson v. Lamb*, 7 E. & B. 84.

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### TISDALE V. TISDALE.

#### *Bond—Possession of land—Ejectment.*

A. having given to B. his bond in the penal sum of £2,500, conditioned among other things that C. and D. should reside on a certain lot of land so long as they conducted themselves in a manner agreeable to A.

*Held* that no notice or demand of possession was necessary before commencing an action of ejectment.

EJECTMENT for the house and tenement with the appurtenances and the lane leading thereto, on the north-west quarter of lot No. 2, 9th concession of Burford. Defence for the whole. The plaintiff gave notice that he claimed title under an assignment of bond from Lot Tisdale, dated the 25th November 1856, which bond was given by Joseph Smith to Lot Tisdale, and was dated the 7th of November 1855. That Smith derived title from the Clergy Reserve Society, and the Clergy Reserve Society from the Crown. The defendants gave notice that besides denying the title of the plaintiff they claimed title as tenants of Lot Tisdale.

The case was tried at Brantford in October 1859 before *Burns, J.* Joseph Smith proved that he gave a bond, dated the 7th of November 1855 (produced), to Lot Tisdale, in a penalty of £200, conditioned that he should within nine years from the 4th of July 1855 make and execute to Lot Tisdale, his heirs and assigns, a valid deed in fee simple, for the north-west quarter of lot No. 2, 9th concession Burford. Provided always, and this is a condition precedent, that Lot Tisdale shall pay the said Joseph Smith the balance of the purchase-money due the Government, being nine yearly

instalments of £10, with interest, or if Lot Tisdale pays up the balance due at once, then Smith to convey at once.

On the 25th of November 1858, Lot Tisdale, by deed poll in consideration of £500, sold and assigned to Lot S. Tisdale, the plaintiff, all his right, title, use, and possession of and in the lands mentioned in the above bond, and also the said bond. No consideration really was paid.

Smith stated that the defendants were living with their father and mother on this place till the old man left it in the spring of 1859, and went to live with his son, the plaintiff. The title to the land is still in the Crown, the instalments of purchase money not being yet paid. That the old man had been many years in possession before 1855.

A bond was also put in, dated the 25th November 1858, from Lot S. Tisdale to his father and mother, Lot and Ann Tisdale, in a penalty of £2,500. The condition—after reciting an agreement that Lot Tisdale and Ann, his wife, being old and infirm, had agreed to and with Lot S. Tisdale, who was to provide a house and suitable living for them and the survivor of them during their natural lives, and that they should live in the dwelling-house they now live in until he could build another suitable dwelling for them, which he agreed to do on his own land in the 5th concession of Brantford (&c., &c., as to the mode of their being provided for), and also that Sarah Tisdale and Martha Amanda Tisdale, daughters of the said Lot and Ann Tisdale, should have the privilege of living in the dwelling-house with their said parents so long as they should conduct themselves in a manner which should be agreeable to the said Lot S. Tisdale, and until he should have an opportunity to sell the lands upon which the said dwelling-house stands, &c., &c., and that he should within five years pay to Sarah Tisdale \$200, and to Martha Amanda Tisdale \$200, and to enable Lot S. Tisdale to perform all, &c., the said Lot Tisdale had assigned a certain bond made by Joseph Smith, &c., &c.—was that if Lot S. Tisdale should maintain, support, and keep his said parents, &c., &c., and should in all things keep, perform, and fulfil the above agreement in all its particulars, then this obligation to be void, &c.

The plaintiff gave evidence that in the spring of 1859 he

was negotiating to sell this lot in order to pay some debts of his father, and to pay off his sisters, the defendants, but the intended purchaser hearing of some quarrel between the plaintiff and defendants broke off the negotiation.

On the defence, Lot Tisdale, the father, was called. He said he had assented to this agreement, though it was not altogether according to his wish ; that he thought the plaintiff never would want to sell the place, and therefore supposed defendants would always live there. That he was living in an addition built to plaintiff's house on another lot of land. That plaintiff had paid some of the debts.

The jury found that the defendants had not set plaintiff at defiance, and that defendants had no notice that plaintiff wanted to sell the place, and that there had been no demand of possession, and they gave a verdict for the defendants, leave being reserved to the plaintiff to move to enter a verdict for him if on the evidence the court thought him entitled to recover.

In Michaelmas Term *M. C. Cameron* obtained a rule *nisi* to enter a verdict for plaintiff, on the leave reserved, or for a new trial, the verdict being contrary to law and evidence.

In this term *McMichael* shewed cause.

*M. C. Cameron* supported his rule.

DRAPER, C. J.—I see nothing in the evidence to estop defendants from denying the plaintiff's title if they had so desired, but it was not argued that the plaintiff had no title, but that the defendants could not be ejected without either notice or demand of possession ; but if it be admitted, as I took it to be, by Mr *McMichael*, that they had no other reason for holding the possession, then I think the plaintiff was entitled to recover. If the defendants were tenants at all, they were tenants only so long as they should conduct themselves in a manner which should be agreeable to the plaintiff, and until he should have an opportunity to sell the lands. Now it appears he had an opportunity which he lost because of quarrels between him and the defendants, and

upon any ground arising out of the agreement between the plaintiff and his father, I do not see that then defendants had a right to keep the plaintiff out of possession.

I think the rule to enter the verdict for plaintiff should be made absolute.

*Per cur.*—Rule absolute.

### GALBRAITH V. FORTUNE.

*Sheriff—Action against for non-payment of rent on sale of goods—Expenses of thrashing crops—Parol agreement for payment of rent—Informal lease may be looked at as evidence.*

In an action against a sheriff for the sale of goods under a *fi. fa.*, without paying rent due to the landlord,

*Held*, 1st. That the statement of the tenant in possession, made before the distress, that the first year's rent had been paid, was evidence in the cause.

2nd. That when a sheriff, acting in good faith for all concerned, agreed to pay for having grain thrashed for the purpose of its better sale, the expenses of such thrashing should be allowed him.

3rd. That a parol agreement to pay rent in advance is binding.

4th. That a lease void for the creation of a term (not being executed according to law) may be looked at to ascertain the conditions of occupation.

The first count in the declaration was in trover for horses cattle, &c. 2nd. For removing the goods and chattels of William Bourne, which defendant had taken in execution on certain writs of *fi. fa.* without satisfying plaintiff for a year's rent amounting to £125 for the premises which Bourne occupied as tenant to plaintiff. Common counts for goods sold, &c., and money counts.

*Pleas.*—To the 1st and 2nd counts, not guilty. 2nd. To the first count, the goods not plaintiff's. 3rd. To the second second count, that Bourne was not tenant to plaintiff as therein alleged. 4th. To second count, that no rent was due from Bourne to plaintiff as alleged. To the common counts, never indebted.

The case was tried at Cobourg in November last before *Hagarty, J.*

The evidence of William Bourne was taken on a commission. He stated that he became tenant to plaintiff for five years, from the 1st of April 1857, of plaintiff's farm in Darlington. The rent was to be paid in advance. He went into

possession in October 1856. He could not pay on the 1st of April 1857. On the 12th of November 1857 the plaintiff distrained, and Bourne's furniture and stock were seized and sold : three horses, one cow, two yearling heifers, two calves, twenty-six sheep, and fourteen hogs. After the sale Bourne prevailed on the plaintiff to buy the things sold from the purchasers and rent them to him, as he could not work the farm without. The plaintiff did so, and rented the stock so purchased to Bourne for £25 per annum, payable yearly in advance, and at the same time as the rent for the rest of the farm. He declared there was no previous understanding between him and the plaintiff about the things being distrained. He identified the lease produced, and explained that John Frank was to have joined in it as security to plaintiff for the rent, but afterwards declined, and his name was struck out before it was executed. The sale in November produced enough to pay the rent for that year, and as soon as that was done the sale was stopped. On the 3rd of April 1858 plaintiff issued a warrant to distrain for the rent of 1858. There were then seized a quantity of seed wheat in the barn, oats, peas, barley, about four tons of hay in the barn, two lumber waggons, one double buggy, two ploughs, two pair of Scotch harrows, six sets of double harness, some poultry, a reaping machine, the household furniture, and a pair of bob-sleighs. After the seizure plaintiff agreed to wait until harvest, as Bourne had growing crops ; the goods seized to be held by Allen, the bailiff, but he did not remain on the farm in actual possession. In the fall, Benson, a bailiff of defendant, seized under executions everything on the place—both Bourne's property and that which he had rented from the plaintiff. Allen came next day and forbade him to sell, as the live stock belonged to plaintiff, and he had the rest under the distress warrant. Allen, or some one for him, remained from that time until the property was sold or removed. Allen notified Benson that a year's rent was due to the plaintiff, and Benson replied that he could not help it, he was indemnified. Bourne told him the same thing, and pointed out the stock which plaintiff had bought : Bourne valued that stock at £160. The rent for 1858 was wholly

unpaid, both for farm and stock. The only money Bourne ever paid plaintiff was about £42 for seed wheat, oats, and peas.

The lease, dated the 1st of April 1857, was put in, and the subscribing witness to it was called. He swore the alterations made in it were in his own writing, and were made before it was executed. The rent was altered to be paid in advance, because Frank, an intended surety, would not sign, and as Bourne was in possession the rent was made payable in advance. Benjamin Allen, the bailiff of the plaintiff, proved the distress and sale in 1857, and the re-purchase by plaintiff of the stock sold, and that plaintiff paid something more than the purchasers had bid to get the things from them; and also that in April 1858 he had seized again, and that on Bourne's application the plaintiff gave him until the following September. On the 5th of September he gave Bourne notice that he would sell on the 15th or 16th of September. He said he remained in possession, partly himself, and had a man in possession all the time. About the 7th of September Benson entered into possession, and Allen on the 10th September served him with a notice in writing, signed by the plaintiff, that he claimed one year's rent from Bourne, amounting to \$500, out of the proceeds of the sale of the goods seized under the execution as belonging to Bourne. Allen also pointed out to him the property claimed as belonging to plaintiff. He said he was indemnified, and sold everything. When the sheriff seized, some wheat was in the barn and some in the field. The plaintiff paid for the thrashing of 500 bushels £22, 4s. 4½d. Benson offered to pay £8 or £9 as being in full for thrashing. The distress in 1857 was for £100; in 1858 for £125, the additional £25 being for the rent of the stock bought by the plaintiff.

A nonsuit was moved for. 1st. The bailiff could not bind the sheriff to pay for thrashing, and that the evidence would not sustain the common counts. 2. The lease was void at law—not being under seal—for a term over five years; therefore there was only a tenancy by implication arising from the occupation, and the rent could not be due in advance.

3rd. That by the arrangement in 1857 the tenancy was changed, and therefore the rent was not payable in advance. 4th. As to first count, no property was shewn in the plaintiffs; the stock was then in the tenant's possession as his own. There was no actual sale, no change of possession, no money passed, and no bill of sale was made or registered. That the goods were not leased, but an additional rent was charged on the land.

Leave to move for a nonsuit on these points was reserved.

For the defence it was sworn that Bourne had in October 1857 declared that his rent for that year was paid; that he had borrowed £250 from one Harrison. That after the November sale Bourne said to the same witness that the men on the farm, and he himself, were hired by the plaintiff, but he had not given up the lease; that the sale in 1857 was all a sham. This was said in Aug. 1858. (Note.—This evidence was objected to on the part of the defendant.) On cross-examination this witness said he was an execution creditor, and had indemnified the sheriff. Another witness, who had an execution in sheriff's hands, and had indemnified, stated that at the first sale on the distress warrant he bought a horse, but did not remove him; that he had not the money to pay, and they refused to wait, and he went away and came back with the money, when the plaintiff told him he should take no advantage of Bourne, as the property was to be given back to him as he was going to work the farm. The witness made them, as he said, pay him \$1 for going to get the money, &c. He said that after the sale Bourne killed and used some of the hogs then sold. One Chappel, a farm servant of Bourne, swore he had heard Bourne swear he had paid the rent, but he would get the landlord to come in with a warrant and keep his creditors out. That after the November sale Bourne killed or sold sheep and hogs as if his own. Duncan Harrison proved he had lent Bourne £250 in February 1857. He stated that in a conversation in January 1858 the plaintiff told him he was obliged to have the sale on the distress warrant in November, as if he had not they would have sold Bourne out: that it was a bogus sale. That the second year's rent was to be allowed Bourne

to build a new house on the farm, and the other year's rent had been paid. On the 16th of August 1857 Bourne showed the witness the plaintiff's receipt for the rent due April 1857. The witness did not know the writing, but when Bourne borrowed the money he said he wanted to pay a year's rent, and the plaintiff told the witness it had been paid. This witness had an execution in the sheriff's hands for £250. He had a chattel mortgage from Bourne. Bourne built no house on the farm.

The learned judge left it to the jury to say if there was a new arrangement entered into between the plaintiff and Bourne in November 1857, under which the rent would not be payable in advance. The plaintiff on this point gave up any claim in this suit for more than £100 rent. He told them the first count depended on the reality of the sale in November 1857; and the second, on the question whether there was a new arrangement or not; and as to the common counts, no express authority was shown from defendant to the bailiff to incur the expense of thrashing the wheat.

The jury found that the first year's rent had not been paid by Bourne, and that the second was due in advance, and allowed for the thrashing, and they gave a verdict for plaintiff and £275 damages.

In Michaelmas Term *Cameron*, Q. C., obtained a rule *nisi* for a new trial, on the ground of the discovery of new evidence as disclosed on affidavits filed, and because the verdict was against law and evidence, or to enter a nonsuit on the leave reserved.

The affidavit filed on moving this rule was that of John Franks, who swore that in May 1857 Bourne told him he had paid the plaintiff £100 in full of the first year's rent, and showed him a receipt for it, which to the best of deponent's knowledge and belief was in plaintiff's handwriting.

In the present term *H. Cameron* shewed cause. He filed an affidavit of the plaintiff denying that he had received the first year's rent, or any part of it, from William Bourne; that he never received £100 from him on account of such rent, or ever gave him a receipt for £100 or for the first

year's rent. That the sale for the first year's rent was *bonâ fide*, and that Bourne induced him to make arrangements to get back the stock sold, which the plaintiff did, and it then became and continued really his property until sold by the sheriff; that after repurchasing he leased the stock to Bourne for £25 per annum. That he never made any agreement with Bourne respecting the tenancy, but that he should pay the rent in advance. He denied that he made the statement sworn to by Harrison at the trial. That Frank was examined as a witness at the first trial, and did not then state he had seen a receipt signed by the plaintiff in Bourne's possession.

An affidavit, sworn by the plaintiff's attorney, confirmed this latter statement respecting Frank's testimony at the first trial.

He cited *Williams v McDonald*, 7 Q. B. U. C. 381, to shew that a sheriff's sale of goods required no bill of sale to pass the goods, confirmed in principle by the case of *Kissock v. Jarvis*, 6 U. C. C. P. 393, and that the fact of the debtor remaining in possession after an actual notorious sale made no difference; *Joseph v. Ingram*, 1 Moore 189, as to the distress for forehand rent, and the general rights of the landlord to maintain this action. On the evidence he cited *Harrison v. Barry*, 7 Price 690. He also insisted that the evidence given for the defence, and objected to at the trial, was clearly inadmissible. Browne's statement could only be made evidence for the purpose of contradicting his testimony by shewing that the two were inconsistent, and he ought to have been asked whether he had made such statements, as the evidence would only be admissible if he denied it. He cited 1 Taylor Ev. 562, 3rd edn. See also *Woodham v. Baldock*, 3 Moore 11; *Latimer v. Batsen*, 4 B. & C. 652.

*Cameron*, Q. C., in reply, insisted that the affidavit of Franks alone entitled the defendant to a new trial.

DRAPER, C. J.—There were three grounds stated in the rule *nisi*. First, the discovery of new evidence, which appears to be the declaration of Bourne to one Franks that

he had paid the first year's rent, and that Bourne shewed Franks a receipt for it, which "to the best of his knowledge and belief" was in plaintiff's handwriting. I do not think Bourne's declaration that he had paid the first year's rent, made before the distress and subsequent difficulty, were in themselves evidence in this cause as the declarations of a party in possession of the land; they are not within the principle on which such evidence is admissible, and as contradictions to Bourne's statement as a witness in this cause they were not admissible, because no foundation was laid in the cross-examination of Bourne for their admission. As to the alleged receipt, the same answer applies so far as regards Bourne's declaration that he had a receipt, and as evidence of the receipt itself the evidence would, I apprehend, be rejected, unless some account of the document were given so as to supersede the necessity of its production. But the strong answer to the application for a new trial on account of Frank's evidence is that it appears he was examined at the first trial of this cause. If he stated these facts, then the evidence is not new; if he did not, it is difficult to understand why, for the same statements were made by another witness, if not by more than one, on that trial, and at the last trial the same facts were submitted to the jury on the evidence of Harrison; and as to Bourne's declaration that he had paid the rent also on the evidence of two other witnesses. If, therefore, this is the principal ground of reliance, it appears to me to fail.

Second.—It was objected that the verdict was against law and evidence. Nothing definite on this ground was stated. As to the evidence, it may well be questioned whether the plaintiff had not a much better founded reason to complain of the evidence that went to the jury; and as to the law, that is involved in the third matter stated in the rule, the application for a nonsuit.

I think none of the objections entitled to prevail. I think that if a sheriff's bailiff seizes unthrashed wheat, and acting in good faith for the interest of all concerned, agrees to pay for having it thrashed for the better sale of it, the expenses of thrashing would be allowable to the sheriff, and if so

chargeable against him. There are many cases in which the incurring expense in relation to things seized before sale is indispensable, and it is a question of degree. I do not agree that a tenant may not by parol bind himself to pay rent in advance. If the instrument produced was wholly void, and could be looked at for no purpose, Bourne's testimony in relation to the agreement to pay rent for the stock was coupled with the statement that he was also to pay £100 per annum for the farm in advance, and this would be parol proof of an agreement. And if the instrument, though void for the creation of the term, may be looked at, as I think it may, to discover the conditions of occupation, then there is proof the rent was payable in advance. *Harrison v. Barry* is a case strongly in the plaintiff's favour, and I do not find its authority has ever been doubted. As to the plaintiff's right to recover on the first count, it was more a question of fact than of law.

On the whole I think the rule should be discharged.

*Per cur.*—Rule discharged.

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### FERRIS V. IRWIN.

*Slander—Embezzlement—How far a person having charge of money in a public capacity can be liable for.*

*Held* that a school trustee having money in his hands, not as secretary and treasurer of a board, or in any official capacity, cannot embezzle such money, his duty as trustee not requiring or authorising him to receive it.

SLANDER—The declaration stated that plaintiff was one of the school trustees of school section No. 16, Darlington, for 1855, and that defendant spoke concerning plaintiff, and concerning plaintiff as such trustee, the words following:—“Thomas Ferris embezzled £25 of the school moneys of 1855, meaning the school moneys of the said section, for the year 1855,” received by plaintiff as such trustee on account of the said school section, whereby the plaintiff hath been rendered liable to be prosecuted for the crime of embezzlement.

*Plea*—1. Not guilty.

2. That the plaintiff did embezzle the school moneys of section number 16 of the township of Darlington.

It appeared at the trial before *Richards, J.*, at Cobourg, in November 1859, that the plaintiff was a school trustee of section No. 16, Darlington, during 1856 and 1857. The slander charge was proved, not quite, however, as laid, for the witness only proved that the defendant said that plaintiff had embezzled the money belonging to the school section. A nonsuit was moved for, on the ground that the words charged no indictable offence, as the plaintiff being himself a trustee, could not *embezzle* moneys which he had in his own custody. Leave to move for a nonsuit on this point was reserved. A good deal of evidence for the defence was given, chiefly with a view to support the justification, and the jury gave the plaintiff a verdict and 1s. damages.

In Michaelmas Term, *Cameron, Q. C.*, obtained a rule *nisi* accordingly, citing *Jackson v. Adams*, 2 Bing. N. C. 402.

In this term *M. C. Cameron* shewed cause. He referred to the act for the punishment of frauds committed by trustees, &c., 22 Vic., ch. 2 (1858), secs. 1, 5, 16, and to the school act, 13 & 14 Vic., ch. 48, secs. 8, 43, and *Williams v. Scott*, 1 C. & M. 675.

DRAPER, C. J.—It appears to me this rule must be made absolute. In the first place, I do not think, though the plaintiff comes within the definition of a trustee given by the 16th sec. of 22 Vic., ch. 2, *i.e.*, “a trustee on some *express trust* created by some deed, will commission letters-patent, appointment to office, or instrument in writing,” that either the first or fifth sections of the act describe the offence with which this declaration states the defendant to have charged the plaintiff. Those clauses declare certain acts to be misdemeanors, but the words in the declaration do not describe those misdemeanors, and the clauses referred to do not contain the word “embezzlement.”

Embezzlement, in its usual acceptation, imports the reception of money belonging to the master or employer of him who receives it in the course of his duty, and the fraudulent appropriation of that money before it gets into the possession

of the master. Now, though it may be that the secretary or treasurer who receives money for the corporation of school trustees, might, if he fraudulently appropriated any of that money, be held guilty of embezzlement, and be properly described as the secretary, treasurer, and servant or clerk of the trustee corporation, this is a different case, and I do not perceive how he could be guilty of embezzlement as a school trustee, when his duty as trustee (not being secretary or treasurer) does not require or authorise him to receive money at all, and if he does receive it, he certainly cannot be said to do so as a part of his duty or employment as servant, clerk, or employee of some superior.

As this declaration is founded on the alleged accusation of *embezzlement* against the plaintiff as a school trustee, I think, for the reasons given, and on the principle of *Jackson v. Adams*, that the rule for a nonsuit should be made absolute.

*Per cur.*—Rule absolute.

### HOPE ET AL. V. CUMMING.

*Taxes, Distress for—Planing machine not fixed to freehold liable for.*

*Held* that a planing machine standing by its own weight on the floor without fastening, with belts and an engine to work it, is a chattel liable to seizure for taxes.

1st count of declaration, charged that plaintiffs owned as reversioners a house, of which one Bird was tenant; that defendant pulled down and destroyed certain fixtures, planing machine, belts, &c., to the injury of their reversion. 2nd—charging same injuries to plaintiffs as being in possession. 3rd count—trover for machine, &c.

*Pleas.*—1st. Not Guilty. 2nd to 1st count. Denying Bird's possession and plaintiffs' reversion. 3rd to 2nd count. Traverse of plaintiffs' possession. 4th to 3rd count. Denial of property of goods in plaintiffs.

The case was tried at Peterborough, before *Hagarty, J.* The action was brought against defendant, who was collector of taxes for the town of Peterborough. It was admitted that £—— was due for taxes on the premises in question,

that defendant was collector, that all proper legal formalities were complied with, that he seized and subsequently sold in due form a planing machine on the premises, and for this the action was brought.

Notice of action was admitted. Also deed in fee from plaintiffs to Thomas Bird of the premises in question, dated the 16th of April 1857.

Mortgage in fee from Bird to the plaintiffs of the same date. Default in payment before grievances complained of.

Mortgage the 13th of January 1857 from plaintiff to Robert Hope in fee of same premises.

Re-lease the 30th of September 1859 (after action) from Robert to plaintiffs of this planing machine.

It was proved that plaintiffs had built the house; that there was this planing machine standing on the floor, not fastened down, but resting by its own weight. There was a steam-engine and belts to work it. Bird died February 1858; after his death his men worked the machine a short time. Plaintiffs never did so after his death, though they had done so before Bird had got the place. Plaintiffs had retained possession of the up-stairs of the main building and another part at the end used as a shop. They were to keep the shop for two years. A door led from the shop into the main building; it had also a separate door. Plaintiffs after Bird's death used to send a man in occasionally to look after the place through this door leading from the shop into the main building.

Mrs Bird swore that she had still possession and kept the keys; that soon after Bird's death she asked one of the plaintiffs what was to be done about the planing machine; he said he hardly knew. When defendant came for the taxes she gave him the key to see if there was anything to seize, telling him to take what he could to pay the taxes, as there was not enough loose property to pay. She considered the shop to be a separate tenement.

It was objected—1st. That the evidence shewed the title to be out of the plaintiffs. 2nd. That the plaintiffs must be in possession to maintain the action. 3rd. That the re-lease put in treated the machine as a chattel, and was executed

after the action was brought. 4th. That the machine was distrainable for taxes.

The learned judge being against the plaintiffs, it was agreed that the jury should find the value of the machine; and that the verdict be entered for defendant, with leave to plaintiffs to move to enter a verdict for them for the value found on the evidence, from which the court might draw inferences. Value was found to be £66.

In Michaelmas Term *Read*, Q. C., obtained a rule accordingly, to which in Hilary Term *Eccles*, Q. C., shewed cause, citing *Wheeler v. Montefiore*, 2 Q. B. 133; *Hitchman v. Walton*, 4 M. & W. 410; *Carscallen v. Moodie*, 15 U. C. Q. B. 92 & 304; *Grant v. Wilson*, 17 U. C. 144; *Anderson, v. McEwan*, 9 C. P. U. C. 177.

*Leith*, contra, cited, as to plaintiff's interest, *Fenn v. Bittleston*, 7 Ex. 152; *Brierly v. Kendall*, 17 Q. B. 942; *Henderson v. McLean*, 16 U. C. 630. And as to fixtures, *Walton v. Jarvis*, 14 U. C. Q. B. 640; *Walmisley v. Milne*, 35 Law Times, 63; *McLeod v. Mercer*, 6 C. P. U. C. 197.

HAGARTY, J.—At the time of this seizure the fee of the land was in Robert Hope, the equity of redemption in the heirs of Bird, and plaintiffs were mortgagees of Bird's estate. The taxes, which it is admitted were lawfully due, were claimed in respect of the premises generally without reference to any particular interest therein. If, therefore, the planing machine was a distrainable chattel, the case is at an end and the action fails. The plaintiffs seem in this difficulty—if the machine be a part of the realty, not seizable as a chattel, they have conveyed away the fee simple to Robert Hope, and the machine passed with it. The re-lease of the machine was taken after action brought, and would appear to be a severance of that article from the rest of the property conveyed to Robert, re-vesting it in them.

I do not feel it necessary to enter into the question raised by Mr Leith as to a mortgagor's rights in a case like this.

I think the planing machine resting on its own weight on

the floor, not attached in any way to the freehold, was subject to seizure for taxes due in respect of the premises. I assume that Bird or his widow was the party assessed.

The case was not in any way treated at the trial in the view of a seizure or claim against Bird of chattels mortgaged to plaintiff, which would have raised a wholly different question. The case was rested on the assumption that the planing machine was part of the realty mortgaged to or owned by plaintiffs. If the plaintiffs owned the premises in fee simple without any mortgage or tenancy outstanding, I think the authorities shew that this machine would be seizable as a chattel.

Hellawell v. Eastwood, 6 Ex. 295; Waterfall v. Penistone, 6 E. & Bl. 889; Hutchinson v. Kay, 29 Law Times, 138 (Rolls). In the last case Sir *J. Romilly* points out the distinction between machinery "belonging to a mill," and that which "forms necessarily a part of the mill, to whatever purpose the mill may be applied." In the case in 6 Exch. 312, the distinction is pointed out—"was the annexation for the permanent and substantial improvement of the dwelling, in the language of the civil law *perpetui usus causâ*, or in that of the year book *pour un profit del inheritance, or merely for a temporary purpose or the more complete enjoyment and use of it as a chattel*. They (the cotton spinning machines) would not have passed by a conveyance or demise of the mill. They never ceased to have the character of moveable chattels, and were therefore liable to defendant's distress."

Consolidated Statute, U.C., page 670, sec. 96 of Assessment Act, ch. 55, enacts that collectors may levy the taxes by distress of the goods and chattels of the person who ought to pay the same, or of any goods or chattels in his possession, wherever the same may be found within the municipality.

On the whole, I think the verdict for the defendant must stand.

*Per cur*—Rule discharged.

## HILL ET AL. V. BELLHOUSE ET AL.

## DARLING V. BELLHOUSE ET AL.

*Partnership—Participation in profits—What rights a creditor may have without becoming a partner.*

*Held* that a party agreeing to give a firm who were indebted to him five years for the payment of the debt, with the understanding that he was to be paid out of the profits, with the right when the debt due him equalled the interest of the members of the firm, to become a co-partner therein, if he chose, or receive a bonus from the business, did not constitute him a member of the partnership or make him liable for its debts.

Such an agreement does not constitute "a participation in profits."

JUDGMENT by default against William Bellhouse on a specially endorsed writ. Declaration against David Bellhouse stated that defendants being partners trading under the style of William Bellhouse & Co., and the plaintiffs being partners trading under the style of Hill, Brothers, & Co., defendants in the course of their partnership business on, &c., by their promissory-note, promised to pay plaintiffs \$418·61 five months after date. Second count—on a bill of exchange drawn by one Joseph Walker on defendants in favour of Thomas Kerby or order for \$303·45, at 30 days, accepted by defendants by the name, &c., of Wm. Bellhouse & Co., and endorsed, &c.

*Plea* by David Bellhouse that he and the other defendants did not make the promissory-note; and that he and the other defendants did not accept the bill of exchange.

There were two other actions in this court, and one in the Court of Queen's Bench, in all of which the evidence was the same. The question being whether David Bellhouse was liable as a partner in the firm of William Bellhouse & Co.

The following instruments under seal were proved and put in evidence:

Articles of agreement made the 10th of January 1852, between William Bellhouse and Henry William Ireland, carrying on business at Hamilton, in the province of Canada, under the name, &c., of Bellhouse, Ireland, & Co., of the one part, and David Bellhouse, of Liverpool, Great Britain, merchant, then residing at Hamilton, of the second part,

reciting that Bellhouse, Ireland, & Co. had become indebted to David Bellhouse in £14,454 for goods, agency, and other services. That David Bellhouse had, under an agreement with Bellhouse, Ireland, & Co., transacted their agency business, and received money in name of commission and percentage on purchases, &c. That it had been agreed that David Bellhouse should give Bellhouse, Ireland, & Co. time for payment, and had accordingly, by articles of agreement of even date made between him and Wm. Bellhouse and H. W. Ireland, given such time on the condition therein set forth. Further reciting an agreement, that while the agency of David Bellhouse, on behalf of Bellhouse, Ireland, & Co., shall continue, the payments to him in the name of commission and percentage shall cease, and in lieu thereof David Bellhouse shall receive from the said firm, as long as they shall owe him any part of the said £14,454, or interest thereon, or until it has been reduced and an election made of the alternative plans set forth in these articles, an annual salary of £500 currency, commencing from the 1st of November 1851, the date when the sum of £14,454 was made up in full, for the services he should render in manner thereafter mentioned. The said articles witnessed that David Bellhouse covenanted with Wm. Bellhouse and H. W. Ireland that he would, so long as the said indebtedness and interest of Bellhouse, Ireland, & Co. should continue, or any part thereof, or an election thereafter provided for be made, act as the agent of Bellhouse, Ireland, & Co. in the purchase and shipment of goods, &c., &c., in consideration whereof Wm. Bellhouse and H. W. Ireland covenanted to pay David Bellhouse £500 currency annually in four equal quarterly payments. And the parties mutually covenanted that it being their intention that such agency and the compensation therefor shall cease as soon as the accumulations of capital stock of Wm. Bellhouse and H. W. Ireland, as exhibited in their balance sheet to be taken on the 1st of May in any one year during the existence of the copartnership firm respectively, shall equal the sum of principal and interest at the same time owing by the said firm to David Bellhouse, so that by a transference of his interest and claims on account

of that debt to the firm of Bellhouse, Ireland, & Co., the said David Bellhouse would have an equal third share with Wm. Bellhouse, and with H. W. Ireland, in the capital stock of Bellhouse, Ireland, & Co., then the said David Bellhouse shall be entitled to demand from William Bellhouse and H. W. Ireland respectively, and from the firm of Bellhouse, Ireland, & Co. either that he shall be admitted into the firm as one of the partners, or shall be entitled to demand a bonus in the name of compensation for his right to claim a share in the said firm, and in discharge of the debt so due to him at the time of the demand and of the aforesaid equality in shares and interests of William Bellhouse, H. W. Ireland, and David Bellhouse respectively—The amount of such bonus and of such demand, and the times, manner, and condition thereof to be settled by arbitration, it being agreed that in the event of David Bellhouse making such alternative demand, and on the same being acceded to and performed, the agency and compensation thereof shall cease.

The parties further mutually covenant that when the aforesaid accumulations of William Bellhouse and of H. W. Ireland respectively shall have increased so as to make their respective contributions to the capital stock equal to the debt of the firm to David Bellhouse, and the firm not desiring that the agency of David Bellhouse should continue, nor that he should become a partner, then Wm. Bellhouse and H. W. Ireland and the firm of Bellhouse, Ireland, & Co. covenant with David Bellhouse to pay their whole debt due to him, and such an amount by way of compensation and bonus, in lieu of his right to become a partner, as the arbitrators aforesaid shall award.

The parties further covenant to refer all disputes that may arise between them to arbitration.

2nd. Articles of agreement made the 10th of January 1852 between David Bellhouse of, &c., of the one part, and William Bellhouse and Henry William Ireland of, &c., carrying on business under the name and style of "Bellhouse, Ireland, & Co.," under articles of copartnership dated the 10th of March 1857.

Reciting that Bellhouse, Ireland, & Co. have become

indebted to David Bellhouse to the full amount of £14,454, 4s. 1d., for goods sold and shipped from England, and for agency business, due on the 1st of November 1851, with interest at 6 per cent., and that David Bellhouse has agreed to enlarge the period for payment as thereafter specified.

Witness that William Bellhouse and H. W. Ireland, in consideration of such extension of credit, for themselves and the firm of Bellhouse, Ireland, & Co., respectively covenant with David Bellhouse—1st. That they will, during the whole period the term of the co-partnership has to run, or during such term as the debt of £14,454, or any portion thereof, or any portion of the interest thereon, remains unpaid, conduct the business of Bellhouse, Ireland, & Co., in all respects on the terms, &c., set forth in the articles of co-partnership, a copy whereof is thereto annexed. 2nd. William Bellhouse and H. W. Ireland covenant, that during the whole period in the preceding covenant alternately specified they will, on the 1st of May in each year, make a balance sheet, which shall be signed by them, and a copy sent to David Bellhouse. 3rd. That William Bellhouse and H. W. Ireland shall pay David Bellhouse the said sum of £14,454, with interest, at certain dates and times fixed, *i.e.*, £6000 on drafts to be drawn by David Bellhouse on and accepted by them at 3, 6, 7, 8, 10, 12, and 14 months after sight, and the whole of the interest on the 1st of May in each year, as long as any part of the principal shall be unpaid. 4th. That on settling every such annual balance “the net profits and every portion thereof appearing to be gained by the principal stock and by the said co-partnership business (after deducting the necessary expenses for carrying on the said co-partnership business and the yearly allowance of £300 by the annexed articles of co-partnership provided for to each co-partner) shall be applied by William Bellhouse and H. W. Ireland towards payment of the balance due to the said David Bellhouse, after full payment and satisfaction to him of the said sum of £6000 by instalments as hereinbefore-mentioned, and the several payments of the said profits on account of the said balance remaining due to the said David Bellhouse, shall be remitted to him

within three months after the ascertainment of the precise amount thereof, and the taking of the said annual account and balance sheet;" "the first of the said payments from the profits of the said co-partnership business of Bellhouse, Ireland, & Co., on account of the said balance due to the said David Bellhouse, as aforesaid, to commence" after taking the annual account on the 1st of May 1855, "and will embrace the whole of the profits made by the said firm for the year preceding the said 1st of May 1855," and so on on the 1st of May in each year until the whole balance due to David Bellhouse is paid. 5th. That so long as any part of the £14,454 is unpaid, David Bellhouse personally, or by agent, may have free access to and take copies of books of account and of all bonds, bills, &c., &c., belonging to the co-partnership business. 6th. That while power is reserved to David Bellhouse further to enlarge the time, yet it is expressly declared, and William Bellhouse and H. W. Ireland covenant, that in case of default of payment by the firm of Bellhouse, Ireland, & Co. in payment of any one of the said instalments, or at any one of the times specified, *i.e.*, as to the £6000, or of default in payment of any portion of the balance of £8454 from the profits of the co-partnership in manner hereinbefore specified, then David Bellhouse shall be entitled to demand and to enforce immediate payment of the whole principal and interest due at the time of such default.

The articles of co-partnership, dated the 10th of March 1851, between William Bellhouse and H. W. Ireland, recite that these parties had agreed to become co-partners together as hardware merchants at Hamilton, and that such co-partnership had commenced on the 1st of November 1850, and was to continue until the 1st of May 1856. They contain covenants for the carrying on, dissolution, and winding up of that co-partnership business, but do not contain anything affecting the question raised in this action.

William Bellhouse was examined as a witness for the plaintiffs. He stated that he and Ireland carried on business under the articles of 10th March 1851. That the two instruments of January 1852 contained the only stipula-

tions which affected either himself or his brother David after the dissolution of the partnership with Ireland in the year 1854, after which time he (William Bellhouse) carried on the business until March 1859, when he suspended payment, and since which time the business was being closed up by David in his own name only. He swore there were no verbal stipulations or agreements whatever differing from the deeds. That David Bellhouse lived in Montreal since January 1852. That all the business of the firm was carried on at Hamilton. David Bellhouse came up a few times. For two years he did not come at all; in other years he came perhaps two or three times. Regular balance sheets were sent to him in Montreal from time to time. Sums of money were paid at various times by the firm to David. The £6,000 and interest were all paid in 1852, and in addition to this William Bellhouse remitted to David Bellhouse sums of money on account of the open balance, or David Bellhouse sometimes drew on Bellhouse, Ireland, & Co., up to 1854; sometimes that account increased, for William Bellhouse being pushed drew occasionally upon David Bellhouse. He recovered against William Bellhouse a judgment for the sum due him, and sold William Bellhouse's goods under that judgment, and bought them in. The creditors of William Bellhouse agreed to a compromise at 6s. 3d. in the pound, and David Bellhouse agreed to pay that for William Bellhouse if the creditors would accept it; some did and were paid by David, and discharged William Bellhouse—others refused. David Bellhouse never elected to become a partner. The agreement for agency was *bona fide*, and for no other purpose than that expressed in the deed. William Bellhouse said he thought it decidedly for the benefit of the firm, rather than to pay for commission as before. In point of fact, the payments beyond the £6,000 were not paid out of the profits, for there were none; though the balance sheet from time to time would show profits, all would depend on the proceeds of sales being realized, which in fact were not to such an extent as to create any profits.

Upon this evidence, the latter part of which was given on

cross-examination, and was objected to by the plaintiffs' counsel, verdicts were given for the different plaintiffs, with leave reserved to the defendant David Bellhouse to move for a nonsuit if on this evidence he could not be held to have been a partner.

In Michaelmas Term a rule *nisi* was obtained by *Macclennan* for the defendant David Bellhouse, calling on the plaintiffs and William Bellhouse to show cause why the verdict against David Bellhouse, and the assessment of damages against William Bellhouse, and the judgment and execution, and all subsequent proceedings, should not be set aside and a nonsuit entered on the leave reserved, on the following grounds:

1st. That upon the construction of the deeds of the 10th January 1852 the defendants did not become partners either *inter se* or as to third parties.

2nd. That even if they did, such partnership ceased according to the evidence at the dissolution of the firm of Bellhouse, Ireland, & Co., in 1854, long before the making of the note, &c., sued on in this cause.

3rd. That no proof was given that defendant David Bellhouse made the note declared on, or was a partner of Wm. Bellhouse at the time William Bellhouse made the same.

In the same term *R. Martin* shewed cause, referring to *Beckham v. Drake*, 9 M. & W. 91, and 11 M. & W. 315; 2 H. of L. C. 579; *Hickham v. Cox*, 18 C. B. 617, and 3 C. B. N. S. 523; *Ex parte Langdale*, 18 Ves. 301; *Ex parte Watson*, 19 Vesey 456; *Barry v. Nesham*, 3 C. B. 646; *Peel v. Thomas*, 15 C. B. 719.

*Macclennan*, contra, cited *Halifax v. Lyle*, 3 Ex. 446; *Wilkin v. Reed*, 15 C. B. 205; *Story on Partp.* secs. 66, 67, 68 & 69; *Smith Mer. Law*, pp. 21 & 22.

DRAPER, C. J.—I have already in the case of *Darling et al.*, against these same defendants, expressed my opinion on the construction and effect of these deeds of the 10th of January 1852, and should have treated that opinion as disposing of this and another case brought by these plaintiffs,

and also of another case brought by Darling et al. against the defendants, but for an observation made by Mr. Martin at the very opening of his argument, founded upon the form of and allegations in the declaration in which respect all these three last mentioned cases are alike.

The declaration states that the defendants being, at and during the times hereinafter mentioned, co-partners trading together as hardware merchants in the city of Hamilton, under the style and firm of William Bellhouse & Co., and the plaintiffs being at, &c., merchants trading under the style and firm of Hill, Brothers & Co., the defendants, by their style and firm aforesaid, for the purposes and in the due course of their said copartnership, trade, and business, on, &c., by their promissory-note, promised, &c. ; and the second count is founded on a bill of exchange drawn by Joseph Walker on defendants, and states that defendants, using such style and firm of William Bellhouse & Co., accepted the same.

I understood Mr. Martin to argue that the first statement in the declaration, "the defendants being at, &c., co-partners trading together under the style of William Bellhouse & Co. was admitted. That as the only pleas were, 1st, by David Bellhouse, that he and the other defendant did not make the said promissory note as alleged ; and 2nd, that he and the other defendant did not accept the said bill as alleged ; nothing was in issue but whether either William or David Bellhouse did in fact make the note and accept the bill. For the partnership being admitted, and that each instrument, if made and accepted by the partnership, was so made and accepted for partnership purposes, proof that William Bellhouse signed the note and the acceptance would entitle the plaintiff to a verdict.

If this were so, a vast deal of time was lost on the argument on the effect of the deeds, and the plaintiffs' right to recover might have been rested on the proof of the handwriting of W. Bellhouse, but I think it out of the question to listen to such an argument, when at the trial verdicts were given for the different plaintiffs, with leave reserved to David Bellhouse to move to enter a nonsuit if on the evidence given he cannot be held to be a partner. Upon this leave

reserved both parties have come before us, and we think the plaintiffs, after that reservation, cannot be heard now to contend that an admission on the record in effect estops the defendant from opening the whole matter.

I think in each of the cases above mentioned the plaintiffs should be nonsuited.

See *Peacock v. Peacock*, 2 Campbell, 45; *Pell v. Thomas*, 15 C. B. 714; *Beckham v. Drake*, 9 M. & W. 91, & 11 M. & W. 315; *Hickman v. Cox*, 18 C. B. 617, & 3 C. B. N. S. 523; *Janes v. Whitbread*, 11 C. B. 406; *Coates v. Williams*, 7 Exc. 205; *Grace v. Smith*, 2 W. B. 998; *Waugh v. Carver*, 2 H. Bl. 235.

RICHARDS, J.—If the agreement of the 10th of January 1852, wherein David Bellhouse stipulates that on a certain event happening he shall be at liberty to become a partner or receive a bonus, gave him an interest in the profits of the business up to that time, then I think he would as to third persons be deemed a partner in law, and liable for the debts of Bellhouse, Ireland, & Co., or of William Bellhouse & Co., if the business of the latter was carried on under the same arrangement. As far as I can understand the cases on the subject, the result may be expressed in a single phrase of Lord Eldon's in the case of *ex parte* Langdale, 18 Vesey 300, viz., "the true criterion is whether they are to participate in profit."

I understand the agreement referred to to mean, that when the share of William Bellhouse and Ireland in the capital stock of the firm should each equal the amount of their indebtedness to David Bellhouse, then David was at liberty to insist on his right to become a partner in the firm, on the same terms as to the business as the others, or on such other terms as they might agree upon, or in the event of his not joining the firm then, that arbitrators should decide what *bonus* he should receive as a compensation for such *right*, and how he should be paid the same and the balance then owing to him by the firm.

I do not understand that David Bellhouse was to be allowed any share of the profits to be made by the firm up to

the time he was at liberty to join it. For, in fact, those profits were to make up the share of each of the partners to an amount equal to the indebtedness of the firm to David Bellhouse. Then the partnership to be formed was to be on the basis of the one between William Bellhouse and Ireland, which was equality of interest between the parties. This would not be the case if David Bellhouse was to participate in the profits that had been made up to that period. In that event he would have the right to claim the one-third of those profits, so that the shares would be unequal; whereas it seems to have been contemplated that the interests of each would be equal when the new co-partnership should be formed.

The mere fact that a creditor agrees to wait on a debtor for the amount of his debt until the debtor can pay him out of the profits of his business does not, as I can see, give the creditor such an interest in the profits of the business as would constitute him a partner. He, in fact, agrees not to sweep away the whole of the debtor's property, which he might do, but only to claim his debt by such instalments as the profits of his debtor will enable him to pay.

It seems to me that there is a broad distinction between such an agreement and one where the creditors of an estate appoint trustees to carry on a business for the express purpose of paying their debts out of the profits of the business so to be carried on. There, in fact, the debt is often directly contracted in carrying on the business out of or by which the profit is to be made; and it is conducted and managed by trustees selected by the creditors. But here the debtor is allowed to retain a large amount of money to be used by him as capital in carrying on his business himself, while the creditor who allows it to remain is, in fact, just receiving that (*the profits*) which the courts say he has a peculiar right to claim for the payment of his debt. Instead of sweeping away the whole estate as he might have done, he has tied up his hands and agreed to receive his pay by instalments equal to the amount of the profits of the business. He cannot receive anything out of the profits beyond his debt, and therefore he has no direct interest in the profits, *qua profits*, further

than to get his debt paid, and the moment his debt is paid—and I see no reason why the copartnership might not pay it at any time—he has no further interest in the profits.

He may have a right to demand that he be admitted a partner in the business, and that right may be more or less valuable according as the profits are large or small, but that is not such an interest in the profits as would make him liable as a partner. I do not therefore come to the conclusion that agreeing to allow a large portion of his debt to remain until paid off out of the surplus profits of the business would make David Bellhouse a partner of the firm of William Bellhouse & Co.

Nor do I think that stipulating that he might at some future period become a partner in the firm makes him one until he avails himself of his right, when he is not allowed to participate in the profits of the firm in the meantime; and such, I think, is the effect of the agreement between the parties. On the whole, I concur that a nonsuit should be entered.

HAGARTY, J.—It is not easy to reconcile all the expressions used by learned judges as to the principles by which the proposition of partnership or no partnership is to be determined. Many of these “dicta” as reported appear inapplicable to the facts of the particular case and judgment finally pronounced. From the vast array of cases, however, some few principles of universal acceptance can be drawn. We find the expression “a participation in the profits constitutes a partnership” very frequently used, and Mr. Martin in his able argument has striven hard to bring the case within its authority. I do not understand how this defendant can in any way be said to participate or share in the profits of this business, or to have any interest in the profits beyond that of every other creditor who looks to the success of the business as his most likely source of reimbursement. If the plaintiff’s argument be pushed to its legitimate extent, it must, I think, include every case in which a trader binds himself to pay a debt out of his profits. It must render every man a partner who, anxious to be

merciful to a business firm which owed him money, agrees with them not to press at once for his claim, but to receive it from them as fast as they can make enough to pay him after defraying all the debts and losses of the business and keeping enough for their own support. The creditor says in effect—"Remain in business five years, pay all your other engagements, losses, and expenses, keep £300 a-year to support yourself and family, and pay me each year whatever further profit you make." I think a creditor making this bargain would be somewhat startled by being told that he thereby became a partner in the concern. In one sense of the term he has an interest in the business, as unless it prospers he may not be paid. He does not take a shilling from any creditor, or in any way reduce the fund from which the proper debts of the business shall be paid. He certainly has no interest in the profits—as *profits*—to use the strange phraseology of the books. The profits are not his to enrich him; he has not adventured any money in the trade which may double or quadruple itself, or possibly be wholly lost in the fluctuations of commerce. He is simply a creditor consenting to a method of deferred payment highly beneficial to the firm, and not in any way detrimental to the undoubted right of the other creditors to receive the full amount of their respective claims.

Had the facts shewn an advance of money made by defendant, to be repaid to him in the manner herein provided, the case would, I think, have been more favourable to plaintiff, and might have raised a strong suspicion of some actual understanding for a share in the profits. I see nothing in the facts before us beyond the arrangement for the liquidation of a just debt to an ordinary creditor of the firm.

The fallacy of the plaintiffs' argument seems to me to consist in assuming that defendant has any interest, participation, or share in the possible profits of the business.

Let us examine Lord *Eldon's* well-known words—"The cases have gone to this nicety upon a distinction so thin that I cannot state it as established upon due consideration, that if a trader agree to pay to another person for his labour

in the concern a sum of money even in proportion to the profits equal to a certain share, that will not make him a partner; but if he has a specific interest in the profits themselves he is a partner." If for the words "for his labour in the concern," we substitute "for an ascertained debt due to him," can we believe it possible that it could be argued that it created a partnership?

The agreement contained in the third deed, giving the defendant the right to ask admission into the firm as soon as the net profits realized by Bellhouse, Ireland, & Co. should amount respectively to the balance due to him after payment of his £6000, or to receive a compensation for such right, to be settled by arbitration if the firm declined receiving him, will not, I think, alter the position of defendant as to creditors of the firm prior to the arrival of the time when such agreement could be enforced.

In its terms it wholly negatives the idea of a partnership existing between the contracting parties up to such time, and as to third parties or creditors, I cannot see how it can in any way affect or prejudice them. It is based upon the proposition that all creditors must be paid and a considerable net surplus realized before it can be made use of. It contemplates as it were the winding-up and closing of the existing copartnership; and after all claims satisfied, if a surplus exist, it is with the balance remaining due to the defendant to be formed into a new capital stock for a new firm, of which defendant for the first time is to be a partner. I see no reason to infer, were I even at liberty so to do, that all these arrangements, with that concerning agency or brokerage, are in reality other than they appear to be in the literal meaning of their terms.

The law as to partnership is, in my judgment, as stringent as it well can be, and I certainly do not feel disposed to stretch it any further to reach a case like the present. If I did so, it would be, I think, wholly at variance with the intention and express contract of the parties to make this defendant liable to creditors who never contracted with him or trusted the firm on his credit, and whose interests could not have been in the least affected prejudicially by the arrangements entered into.

It would, I think, be an unwise adherence to the wording of certain loose definitions to be found in the books, and a disregarding of the clear principles on which the laws of partnership rest. Many of the definitions are inexact, but the decisions themselves seem uniformly based on clear and intelligible principles. In *Grace v. Smith* (2 Wm. Bl. 998) *De Grey*, C. J., says—"If anyone advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in these profits; he relies on them for repayment. And there is no difference whether that money be lent *de novo*, or *left behind* in trade by one of the partners who retires. I think the true criterion is to enquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment." *Blackstone*, J., thought "that the true question in these cases was whether the profit or premium was certain and defined, or casual, indefinite, and depending on the accidents of trade."

In *Bissett on Partnership*, 12-15, quoted in *Cary on Partnership*, notes to section 46—"In all cases where a person is to be paid for his services by a sum proportioned to the profits, he must be entitled to an account of the profits. In many of the cases it will be seen that notwithstanding a clear right to an account no partnership was held to subsist as between the parties or as to third persons."

I cannot understand how the defendant in this case could claim any specific lien on the profits as such, or ask an injunction to restrain the firm from receiving them, &c., &c., or adopt many of the courses open to those directly interested in the profits. He cannot in any way interfere with the members of the firm in their dealing with the profits, although he may ascertain their amount in order to fix the amount payable to him towards the satisfaction of his debt, which has to be ultimately paid to him whether profits may or may not be made.

The case of a person actually engaged in the business of a firm, and paid a salary bearing a certain proportion to the profits, appears to me to be a far stronger case in favour of

the plaintiff's argument than that of a creditor like the defendant. Dr. Story seems strongly opposed to the doctrine of constructive partnerships as to third persons when no such relation exists in fact between the so-called partners. Such seems to be the leaning of modern writers on this head. (Story on Partnerships, sec. 38)—“The question is, whether the circumstances under which the participation in the profits exists may not qualify the presumption and satisfactorily prove that the portion of the profits is taken, not in the character of a partner, but in the character of an agent, as a mere compensation for labour and services. If the latter be the true predicament of the party, and the whole transaction admits, nay requires, that very interpretation, where is the rule of law which forces upon the transaction the opposite interpretation, and requires the court to pronounce an agency to be a partnership contrary to the truth of the facts and the intentions of the parties. Now, it is precisely upon this very ground that no such absolute rule exists, and that it is a mere presumption of law which prevails in the absence of controlling circumstances, but is controlled by them, that the doctrines in the authorities alluded to are founded. If the participation in the profits can be clearly shewn to be in the character of agent, then the presumption of partnership is repelled. In this way the law carries into effect the actual intention of the parties, and violates none of its own established rules.”

I think it right to add as to the case of *Hickman v. Cox*, now said to be carried to the House of Lords, that its ultimate decision in favour of making the defendants partners would not, in my judgment, affect this case or the opinion now pronounced in favour of the defendant.

Rule absolute to enter a nonsuit.

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## BRAID V. THE GREAT WESTERN RAILWAY COMPANY.

*Railway—Unskilful construction of—Setting aside the verdict as against the weight of evidence.*

Upon an action against a railway company for negligence in the construction of their line, it was proved on the trial that the embankment which had given way and caused the death of the party on whose account the action was brought, was so constructed that a pool of considerable extent was formed, in which the drainage of 60 or 70 acres of land would remain and saturate the railway track upon occasion of heavy or continued rains. The jury—although several of the most eminent engineers of the province gave their opinion that the embankment was properly and skilfully constructed, and the learned judge who tried the case cautioned them against valuing such evidence lightly—gave a verdict for the plaintiff. The court, upon motion for a new trial on the ground of the verdict being against the weight of evidence, discharged the rule.

*Draper, C. J., dissenting.*

The declaration stated that the defendants were owners of the Great Western Railway, and of certain carriages used by them for the conveyance of passengers, &c., for hire and reward, and thereupon Alexander Braid, at defendants' request, became a passenger in one of their carriages, to be safely carried along the railway from London to Hamilton, for such reasonable reward as they should demand in that behalf, and defendants received Alexander Braid as such passenger. Yet defendants not regarding, &c., did not use due or proper care and skill in and about the construction of the said railway, and in repairing and maintaining the same, and in the carrying and conveying the said Alexander Braid, but took so little care, &c., that by reason of such want of care and skill one of the embankments of the railway was then partially carried away and destroyed, and the carriage which contained the said Alexander Braid was thrown off the rails with great violence, and the said Alexander Braid was then killed, to the damage of plaintiff, &c.

*Pleas.*—1st. Not guilty. 2nd. That Alexander Braid was a passenger on the railway, at the time he was so killed, of his own wrong, and without the leave, consent, or knowledge of the defendants, and at the risk of him the said Alexander Braid, and without any payment, remuneration, or reward being made by him to defendants for his passage. 3rd. That the said Alexander Braid was a passenger at the time he was so killed travelling upon a free pass ticket granted by defendants to him without fee or reward, upon the terms

accepted by him that while using and travelling on the same he assumed the risk of accident and damages.

The trial took place at Hamilton in October 1856, before Sir *J. B. Robinson*, C. J. It was admitted that Alexander Braid was in the train coming from London to Hamilton, in the sleeping car, and was killed by the accident which happened on the morning of the 19th of March 1859, about 2 a.m. Evidence was given to establish that the deceased was in the train as a passenger, paying his fare and having all the rights of a person in that position. It appeared that he had been an officer in the defendants' employ, and had a free pass both in the year 1857 and 1858; that according to the rules of the company, of which as an officer he was cognizant, he ought at the end of each year to have surrendered his pass, but it seemed he had retained both. That after he had left defendants' service, and in 1859, he had on more than one occasion claimed the right to pass without paying, and had in one instance at least done so successfully, exhibiting one of the passes which had expired, while on other occasions he had been obliged to pay. That on the occasion in question he had not been asked for a ticket while on the train; that he had gone into the sleeping car though declaring he did not wish for a berth therein. There was no evidence that he had paid his fare or taken a ticket, and according to the usual conditions of a free pass he ran the risk of any accident. Upon this question the learned Chief Justice left it to the jury to determine on what footing he was a passenger—whether, although in fact he had no free pass then in force, he claimed to pass free, and his claim was acquiesced in by the conductor of the train, in which case the Chief Justice directed that the plaintiff should not recover.

There were two other cases tried at the same assizes, both of which are now before the court, in which the same evidence was given on the subject of negligence, but in which the preliminary question did not arise; these were the cases of *Fawcett, administratrix, v. The Great Western Railway Co.*, and *McAleese v. The Great Western Railway Co.*

These three cases were all argued together before the court as raising the same question and depending on the same evidence.

It was proved that the train in question was going from Copetown towards Hamilton on the morning in question (19th March, 2 a.m.) at the rate of about ten miles an hour. That an emigrant train of two locomotives and twenty cars had come up from Hamilton on the night of the 18th of March, and had arrived at Copetown at 11.30 p.m.; and that a freight train with eleven cars—two of them loaded—passed over the place where the accident happened at ten minutes past 1 a.m., 19th March, having left Hamilton at half-past 12; and that another freight train with 13 cars had passed the same spot, going down, after 11 o'clock, p.m., 18th of March. All appeared safe when these trains passed—there was nothing to attract attention or create alarm. The night was stormy, and there was an extremely and unusually heavy fall of rain from 6 in the evening. The weather had also been wet for two or three days previous, and the frost was coming out of the ground. When this train reached about two miles above or west of the Dundas station, it appeared that the embankment had already given way, and the engine, &c., were precipitated into the breach. The southerly side of the embankment was entirely gone. The breach was about forty-five yards in length in the line of the track, sloping down to the bottom, where it averaged about six yards in breadth. The quantity of material removed (which material was coarse red sand) was about three thousand cubic yards. The embankment—on the top of which the railway track was laid—was constructed on the slope of the mountain, and the track itself was about forty feet above the natural slope, and the upper or northern side of the embankment was only twenty-five feet below the same level; and from the level of the track to the bottom of the embankment on the lower or southern side there was a fall of sixty feet. A part of the embankment about twelve feet high on the upper or northern side was not carried away. The difference of level between the opposite sides of the slopes of the embankment was therefore thirty-five feet high. There was a large culvert distant about 150 yards to the east of the place where the breach took place, and another large culvert a much longer distance to the west of it, and these culverts were, in the judgment of

most of the engineers examined, ample to carry off all the water that would come down on the north side of the embankment if that water had been properly guided into them. There was near the breach a hollow or depression of the soil, called by some witnesses a pond, by others a basin, of a depth, according to some testimony, of two feet four inches, to other evidence of only about nineteen inches. From this place there was a very abundant descent to carry off all the water which was not detained in the hollow. There was contradictory evidence as to water lying in this hollow. One witness represented it as about fifty feet long and ten or twelve feet wide. It was also proved that somewhere near this place there was a small spring in the base of the bank, and that it was at first contemplated to put a culvert at or about that spot, but it was considered as unnecessary. Clay or earth had been dug out at the hollow for some purpose connected with the construction. Some witnesses swore a ditch had been made along the northern side of the embankment, while others were positive it never had been completed; and the weight of evidence certainly shewed that only such water as overflowed this hollow could flow down to the eastern culvert just at the time or directly after the breach had taken place. There had been a slide of the embankment at this same place in 1855, before it was finished. At that time the cars passed along tressels, and they remained in the embankment when it was filled up with earth. Some of the defendants' witnesses stated their decided opinion that all the water which this hollow could contain would be insufficient to cause any injury to the embankment. After the accident some stones and rubbish were found lying in the ditch near the hollow, but it was thought they might have been washed down during the storm. Since the breach, however, a paved ditch had been constructed along the northern side of the embankment, which is treated as a protection against all possible future risk from rain or water descending the slope of the mountain. There is an area of some fifty or sixty acres to be drained, the waters of which should pass down the eastern culvert. There was a conflict of opinion as to the immediate cause of the accident; though

all concurred in attributing it to the heavy fall of rain, they differed as to the manner in which it occasioned the breach in the embankment—how it penetrated into the embankment, and so rendered it too fluid to sustain the superincumbent pressure. Some considered that it remained as surface water until it reached the embankment, when it penetrated directly into it, while others expressed an opinion that it sunk into the natural surface first, and so passed under the embankment, descending the slope of the mountain till it met with the clay or some substance which stopped its further descent, and then it would accumulate and rise within the embankment until it produced the breach. The defendants called several very eminent engineers, who, while expressing the latter opinion, coupled it with the statement that no person could tell absolutely how the mischief had occurred. But they generally agreed in saying that every precaution against accident or danger to the work, which in the exercise of their judgment they should have thought necessary, had been taken; some stating that they did not consider the making of the new ditch necessary for the safety of the work. Still there was a very general concurrence of opinion that it would be very unsafe to allow water to remain for any length of time lying against the side of the embankment; that the probably injurious consequences of such an act must be self evident to any person qualified to form an opinion. The defendants' employees, who swore that they were in the habit of making a daily inspection along the line, denied that water was left in that manner; the plaintiff gave evidence to establish that fact, and in support of that view a model was made of an embankment constructed of similar soil, against which water was allowed to press, and which gave way on the lower side, leaving a portion of the upper slope standing, very much as seems to have been the case at the breach in the embankment.

The learned Chief Justice left it to the jury to say whether there was culpable negligence either in the construction or in the maintenance of the embankment to which, without doubt, the accident could be attributed. After drawing their attention to the evidence and the leading points in dispute,

he told them they should be cautious in coming to that conclusion, especially against very decided opinions of eminent civil engineers wholly unconnected with the work and with the defendants. That the presumption, till the contrary was proved, was that the company did their duty, as it was their plain interest to do.

On this direction the jury in each of the three cases found for the plaintiff; and in the first case found also the issues as to whether the deceased Braid was a passenger paying his fare, or was in the train in the manner stated in the 2nd and 3rd pleas in favour of the plaintiff in that cause.

In Michaelmas Term *Becher*, Q. C., obtained a rule *nisi* for a new trial on the ground of misdirection and want of direction in Braid's case; as the jury should have been told that if they believed the evidence on the questions that deceased intended to travel free, or that he was travelling on a pass or setting up a pass, they should find for defendants. That in all the cases the jury should have been told that the employment by defendants of skilled and competent engineers and the using good materials in the formation of the portion of the line of their railway in question, with the fact of its having been used for five years without suspicion of insecurity, and having been watched and inspected daily, was sufficient to rebut negligence. That the jury should have been told that negligence was not proved, or if *prima facie* proved, it was rebutted; that the weight of evidence was in their favour, and that they were not bound to provide against extraordinary storms. That the charge was too wide or general, leaving everything to the jury without a specific direction on the question of culpable negligence or the evidence bearing on it, and also on the ground that the verdict was against law and evidence. He cited *Blyth v. Birmingham Water Works Co.*, 11 Ex. 781; *Doyle v. Wragg*, 1 F. & F. 7; *Crofts v. Waterhouse*, 3 Bing. 319; *Aston v. Heaven*, 2 Esp. 533; *Christie v. Griggs*, 2 Camp. 81; *Brown v. Sargent*, 1 F. & F. 114; *Taylor on Evid.*, Vol. 1, c. 3; *Sutherland v. G. W. R. R. Co.*, 7 U. C. C. P. 409; *Hullman v. Bennett*, 5 Esp. 226; *Fitzsimmons v. Inglis*, 5 Taunt. 534.

In Hilary Term *Freeman*, Q. C., and *M. C. Cameron*

shewed cause. They referred to *Great N. R. R. Co. v. Harrison*, 10 Ex. 376; *Grote v. Chester & Holyhead R. R. Co.*, 2 Ex. 251; *Manley v. St Helen's Canal*, 2 H. & N. 840.

DRAPER, C. J.—I deliver my opinion with unfeigned distrust of its correctness, as I stand alone in maintaining it; and if after repeated consideration I could have brought myself to a contrary conclusion I should most cheerfully have done so.

The negligence charged in the declaration in Braid's case is—1. Not using proper care and skill in the construction of the railway, or in repairing and maintaining it. 2. In not using proper care, &c., in carrying Braid as a passenger.

In *Fawcett's* case the negligence charged is—1. The unskilfully and improperly placing, building, and constructing the railway and the switches, bridges, embankments, culverts, drains, and gutters thereof, and making them of insufficient materials and size. 2. Negligence in carrying *Fawcett* as a passenger.

In *McAleese's* case the declaration is the same as in *Fawcett's*.

There is no pretence for sustaining the verdicts on the grounds of negligence secondly alleged, for there was no evidence to sustain these allegations. It is true the night in question was stormy, and an unusually heavy rain was falling; but these circumstances neither created any obstacle nor gave rise to any apprehension of danger, so that it could be considered negligence to continue to run the trains as usual. Other trains had shortly before passed over the track without difficulty; the rate of travelling was very moderate, and no witness has imputed blame to the officers of the company who were in charge. If the verdict had been rendered upon this cause of complaint I should have thought it clearly wrong.

But I apprehend that it is either on the alleged negligence of construction, or of maintaining and repairing, or of both, that the jury proceeded in Braid's case; and on the negligence of construction in the other two cases, for in them

nothing is said about repairs or maintenance. In argument no distinction was observed upon between the declaration in the different cases. The plaintiff's counsel relied to support the verdicts on alleged negligence of construction and alleged negligence of maintaining in proper condition and repair.

As to the first—it has not been contended that it was improper and unskilful to construct an embankment on a slope such as this is proved to have been in order to carry the railway along the side of the mountain.

According to Mr. Keefer's evidence, the embankment was constructed of coarse red sand. There may have been clay or gravel intermixed, but this seems to have been the principal material at the place where the breach took place. I do not find that any one of the engineers examined on either side condemned the material as improper. In their theories as to the probable cause of the breach the insufficiency or unfitness of the material is not alluded to.

Then as to the mode of construction, three questions have been suggested. Was there a sufficient number of culverts? Were those culverts sufficiently large? Was the water which drained down the mountain properly conducted to those culverts? It was proved that when the embankment was first begun it was proposed to have one culvert near this very spot. A witness spoke of its having been begun, though this seems doubtful, but the idea was abandoned, because a culvert at that spot was deemed unnecessary; and the opinion that it was unnecessary, as well as that the culverts which were constructed were sufficient to carry off all the water which was ever likely to flow down from the mountain, was confidently expressed by almost every engineer to whom the question was put. I assume that it was just as necessary to provide for conducting the water into the culverts as it was to construct the culverts. There is contradictory evidence as to whether this was done or no. Those immediately connected with the construction of the work declare that a ditch was made and finished leading along the northern side of the embankment to the eastern culvert. Other witnesses say that though such a ditch was begun it never was finished.

On this point it appears to me the evidence on the plaintiff's side preponderates. The levels taken by Mr. Keefer incontrovertibly establish that there was an abundantly sufficient descent all along the north side of the embankment to carry the water down to this culvert, with one exception, that is, the hollow pond or basin so much talked of at the trial. Putting this exception aside for the moment, the evidence would seem to establish that no water did, nor in fact could, become stagnant and lie against the side of the embankment—it must run down the descent, unless it penetrated the soil. The evidence, therefore, leaving the hollow out of consideration, appears to me so far rather to negative than to sustain the charge of faulty construction. And on this point the testimony of the engineers employed by the defendants during the progress of the work is in my humble judgment of great importance. They state they were not restricted in expenditure where the safety and permanence of the work was in question, but were left to the unfettered exercise of their own judgment on such matters, and that they did take every precaution which their skill or experience suggested. Their character as men eminent in their profession was not impeached, and these opinions were confirmed by other engineers of the highest reputation on this continent. If the verdict of the jury is based on the conclusion that the work was negligently or unskilfully constructed, I cannot but say that in my opinion the weight of evidence is the other way.

Then, as to negligence of maintenance and repair—The leading fact relied upon in connexion with the alleged absence of a ditch is the existence of this hollow or basin described as being about fifty feet long, *i.e.*, I suppose, from east to west, or along the side of the embankment, and ten or twelve feet wide, *i.e.*, from south to north, from the base of the embankment up to the slope of the mountain. The greatest alleged depth, two feet four inches, was, I presume, close to the embankment, and it must have necessarily decreased in depth, going north, from the formation of the ground. There is room to question whether there was water generally lying in it or no. The people in the employ of the defendants, whose duty it was to make a daily inspection,

deny it most unequivocally. And on the other side the evidence that there was water lying there, resting against the base of the embankment, relates mainly to the time of the accident. That water must have collected occasionally, more or less in quantity, in such a hollow as was described, admits, I think, of no doubt. Possibly the character of the natural surface of the mountain facilitated its rapid infiltration. The evidence favours this supposition. All agree as to the impropriety of allowing water to remain stagnant against the base or side of such an embankment. I take the testimony to establish that it might prove dangerous, and if so, negligent. But such a fact could not be overlooked if there was a continually recurring inspection, and if noticed, it is difficult to suppose it would have been allowed to remain. Without discrediting Mr. Read and other witnesses, it cannot be assumed that water *remained* in the hollow, though every heavy shower may have caused some water to gather in it. But while I feel compelled to conclude that there was an occasional and temporary gathering of water in this hollow, so far affording proof of negligence, it does not follow as a necessary consequence that the defendants are liable to these plaintiffs. Negligence is but a part of what they have to establish; it must further be proved that the injury and damage complained of was caused by such negligence. It would be no more correct to infer that because there was some negligence that this breach arose from it, than that because there was a breach therefore there was negligence. Here, again, it appears to me the verdict is against the weight of evidence.

In my view, it is a very important consideration that some of the most eminent and experienced engineers who were witnesses stated their belief that no one could with any degree of certainty affirm what was the actual direct cause of the breach. Not that anyone doubted, I suppose, that the rain which fell in some way penetrated into the embankment and converted it into a partially fluid state, dissolving its coherence, so that it could no longer support the pressure from above, but as to how this change from a solid embankment was immediately created—how the water penetrated—

they offer only opinions. Other witnesses, some not engineers, find less difficulty in arriving at a conclusion. But as Lord C. J. *Jervis* rightfully remarked on one occasion, "nothing is so easy as to be wise after the event." The weight of scientific evidence leads, I think, to the belief that all the water which this hollow could have contained would have been by itself wholly insufficient to have occasioned a breach of that magnitude. And this belief rests not merely on the direct testimony of some witnesses, but on two other facts pretty clearly proved—first, that the embankment had stood some five years through all ordinary seasons and weather without injury from the time it was finished—for the slide in 1855 was before it was finished—and that defects of construction exhibit themselves in a much shorter time; that, in short, an embankment becomes more settled down and solid every year it stands. Second, That there was an extraordinary fall of rain, which had been preceded by two or three wet days, and at a season of the year when the frost was coming out of the ground. As to the importance of this consideration, I cannot do better than quote the language of English judges. In *Brown v. Sargent* (Fost. & Finl. 112), *Erle, J.*, says—"If the accident had been caused by an extraordinary storm, it would have been the act of God, and the defendants would not have been responsible." In that case it was an unusual fall of rain which it was asserted caused the bursting of a sewer sufficient for all ordinary purposes. Again, in *Withers v. The Great Northern Railway Company* (F. & F. 165), the same learned judge says—"Was the damage to the line occasioned by the flood, and if so, was it an ordinary flood, or one within the ordinary range of experience or the ordinary action of the elements, which ordinary prudence and precaution ought to have guarded against, or was it an extraordinary flood? It does not appear that there had been any default or defect on the line down to the present occasion. But was the flood which has been described one which *common prudence* could guard against? If you think the damage was caused by the negligence of the defendants, find for the plaintiff; but if the damage was caused by some extraordi-

nary accident that no prudence could be expected to guard against or foresee, the defendants are not liable." And see this case on motion for a new trial (27 L. J. Exch. 417; 3 H. & N. 969, American reprint).

In *Wyborn v. The Great Western Railway Company* (Fost. & Finl. 162), *Watson, B.*, charged the jury—"If the accident was entirely owing to the act of God in that extraordinary storm, *and that very shortly before the train came up the line had been washed away by it*, the company would not have been answerable for that."

I refer also to *Ruck v. Williams* (3 H. & N. 308), judgment of *Bramwell, B.*, in which a distinction worthy of observation is taken.

The principle contained in the foregoing directions to the jury seems to be, that if the damage which accrued accrued solely by reason of an extraordinary storm, there is no negligence in not providing against such a casualty, and consequently no liability. And applying that to the point now under consideration, it would render the negligence exhibited in not perfectly draining this hollow unimportant if the proximate and moving cause of the breach in the embankment was the extraordinary fall of rain. It is no answer to say that the additional culvert originally proposed would have prevented the accident, because that is proved to have been unnecessary for the ordinary action of the elements within the ordinary range of experience, and there is no duty to take precautions against that which ordinary prudence and foresight cannot foresee.

It appears to me, therefore, that this point is also, as to the weight of evidence, in the defendants' favour.

I may sum up some conclusions which I think deducible from the evidence.

1st. The bank gave way near a place where there was a hollow in the ground wherein water, the drainage of 50 or 60 acres, might partially collect to a depth not exceeding two feet four inches, and this hollow probably was filled during the two or three wet days immediately preceding the rain storm which fell on the night of the accident.

2nd. The ditch along the side of the embankment, if

ever sufficient to drain this hollow, was not so when this storm occurred, though all the water which overflowed the hollow would pass readily to the eastern culvert.

3rd. Water should never be allowed to remain stagnant against an embankment.

4th. It is almost impossible to assign with certainty the cause of the breach. Though there are but two theories advanced, neither of them seems capable of positive proof.

5th. The weight of evidence is against the conclusion that the water proved to have been detained in this hollow was the cause of the breach.

6th. The weight of evidence shews that every precaution which skill or experience could suggest as necessary under the apparent circumstances had been taken, and that there no danger could have been reasonably apprehended unless from an extraordinary storm. Some engineers went so far as to say not even in such an event.

7th. Though the materials of the embankment were porous, coarse red sand, the embankment had stood too many years to allow of this being considered as an unskilful or improper construction, and any defect of this kind—if it were a defect—would have become patent long before. The settling down of the embankment under the pressure of heavy trains must have made the whole mass solid and substantial.

8th. There was no negligence shewn in the conduct and management of this particular train.

9th. The leaving of the trestle work in this embankment, though to a person not acquainted with these matters, as I do not pretend to be, is apparently calculated to weaken its solidity as the timber decayed, was not adverted to by any of the engineers as an improper or unskilful act, or as in any way a cause contributory to the breach.

I am not prepared to express a dissent from the question submitted to the jury, or from the observations with which it was submitted. They were cautioned as to a conclusion that the defendants were guilty of culpable negligence against the opinions of the eminent civil engineers examined as witnesses, and were told the presumption was in the de-

fendants' favour unless the contrary was proved. Still they found for the plaintiff in each case, and, as I understood, the learned Chief Justice is not dissatisfied with the verdict.

So far as the damages are concerned, I see no ground for the courts interfering; but after a very close and careful examination of the evidence, it appears to me, taking the case step by step, that at each step that which to my mind is the weight of evidence does not support the verdict. The defendants are convicted of negligence in the construction or maintenance, or both, of this railway. By far the greater number of engineers examined, and among them certainly those whose reputation for skill and experience stands highest, give testimony denying, so far as their knowledge and judgment goes, that such negligence existed. No one has ventured to impeach their integrity. To this moment no one can positively affirm, or undertake to demonstrate, to what cause the breach was actually attributable. It is under these circumstances I cannot help thinking that the negligence complained of is not proved, and therefore that there should be a new trial.

RICHARDS, J.—I have had the advantage of going over the evidence taken at the trial with the learned Chief Justice of the Court of Queen's Bench, before whom the cause was tried, and I have since carefully perused and considered the very able judgment of the Chief Justice of this Court, and I am therefore, I think, sufficiently impressed with the facts of the case.

I consider it clearly established by the evidence that the subsidence in the embankment, which was the cause of the accident, took place at a point immediately opposite what was the pool or basin of water spoken of by the witnesses.

The evidence, professional and otherwise, appears to me to establish that it is of great, if not of paramount, importance that the water should be carried off from the sides of embankments constructed as this was; and in relation to the drain which was formerly constructed there the weight of evidence seems to be that it was not as well constructed as it now is or ought to have been. But the larger number of

professional witnesses were of opinion that the small quantity of water which collected in the pool or basin which was formed by the improper construction or the want of proper care in the clearing out of the drain could not have produced the accident. At the same time, they could not say with certainty how the accident did occur. Various theories were propounded and suggestions made, but the majority of the witnesses did not seem to have any decided opinion on the matter. On the other hand, some of the witnesses for the plaintiff, who were professional men also, but certainly not of the extended reputation of some of those called for the defendants, were of opinion that the pool or basin spoken of collected the water there, and kept the soil saturated. And at that particular season of the year, when large quantities of water were likely to collect, keeping the pool constantly full, a sufficient quantity would percolate through to produce the mischief.

The judgment of His Lordship, the Chief Justice of this court, disposes of the question of misdirection, but he is of opinion there should be a new trial, as the verdict is in his opinion against the weight of evidence. It cannot be argued that there is not evidence to go to the jury to warrant their verdict, if they thought proper to rely upon it rather than on the professional evidence given for the defendants. So that the case now stands before us as one in which a new trial is to be granted, if granted at all, on the ground that the verdict is against the weight of evidence. In *Mellin v. Taylor*, 3 Bing N. C. 109, Chief Justice *Tindal* says:

“We agree that in every case in which the verdict has turned upon a question of fact which has been submitted to a jury, and there is no objection to the verdict except that it is found in the opinion of the court against the weight of evidence, the court ought to exercise not merely a cautious but a strict and sure judgment before they send the case to a second jury; the general rule under such circumstances is that the verdict once found shall stand, the setting it aside is the exception, and ought to be an exception of rare and almost singular recurrence.”

Mr. Lush in his *Practice*, at p. 537, thus lays it down:—

“ Another and frequent ground for a new trial is that the verdict is contrary to the weight of evidence, which also supposes corruption or mistake on the part of the jury. It is the invariable practice in these cases to refer to the opinion of the judge who tried the cause, and to discharge or make absolute the rule according as he is satisfied or not with the verdict.”

Even in an issue out of Chancery, which is directed to satisfy the conscience of the court where the evidence has been fairly before the jury, and the judge who tried the cause has expressed himself satisfied with the verdict, there is great difficulty in supporting a motion for a new trial on the ground that the verdict is not supported by the evidence. *Johnson v. Todd*, 5 Bevan 597 & 394.

“ Where there has been a great mass of evidence left to a jury, and it has been left in a manner not to be complained of, and there is no reason to suppose any desire on the part of the jury but an anxious one to discharge their duty, it is a matter of nice discretion to grant a new trial on the ground of the verdict being against evidence, unless the court think the jury committed an error in that which is ordinarily their exclusive duty. Although such discretionary power has been established by the practice of the judges within a very recent time, yet it is one that will be carefully exercised upon great deliberation.”—*Kincaid v. Willis*, 14 Law Times, 505, Q. B.

I believe this cause was tried before a special jury, and there is “no reason to suppose on their part any desire but to discharge their duty” properly. Many of them were probably natives of the part of the county where the accident occurred, and others who have long resided there. It is probable some of them have had more or less experience in the ordinary roadmaking of the county, and could judge of the effects of water on an embankment at the side of a hill or ravine when not thoroughly drained. These gentlemen, from their experience and observations, would be well able to appreciate the reasons suggested by the different witnesses for the conclusion at which they arrived as to how the accident was caused, and whether the defective state of the drain contributed to it or not. The verdict they have given is temperate as to the

amount of damages, and, as far as I can learn, they appear to have found against the defendants after due deliberation and consideration.

The learned Chief Justice, a judge of very great experience and ability, one not likely to overlook or lightly value the evidence of professional gentlemen of standing, reports to us that he is satisfied with the verdict.

Under these circumstances I am not prepared to say that we can with propriety grant a new trial on the grounds pressed upon us. As far as my own personal views are concerned, after the best consideration I can give the subject, though I am not prepared to say if I had been on the jury I should have concurred in the verdict, yet I cannot say that I differ from the conclusion at which they have arrived—much would depend upon what took place at the trial, and the manner in which the evidence impressed me as given by the witnesses, as to the verdict I would have given if I had been on the jury.

I am of opinion that in this and the other two cases the rules for new trials must be discharged.

HAGARTY, J.—I think the evidence established that where a railroad was formed by an embankment along the side of a steep hill the greatest care should have been taken to secure the best drainage. The water flowing from sixty acres of sloping land had to be provided for in duly protecting the embankment.

I think the evidence failed to shew that as much care had been taken of this drainage as might have been. I do not think that the rain-storm on the night in question was of that unprecedented violence which could not reasonably have been foreseen as likely to occur in that region, although possibly at long intervals.

I think it clear that the action of water caused the breach in the embankment, but it is by no means clear in what manner or from what particular cause this happened, or that defective drainage may or may not have been the cause. There was evidence of some gathering of water at

the spot where the breach occurred, but nothing very satisfactory as to the action of such water.

Had the verdict been for the defendants, I could not have felt warranted in disturbing it. I am not now prepared to say that the verdict for plaintiff is so much against the weight of evidence as to warrant our interference with it. I cannot point out in what respect the verdict is wrong, nor how the jurors have erred, as the defendants insist they have.

It is almost wholly a question of fact; as such it has properly been submitted to a jury; and unless I can see with clearness in what respect their finding is not warranted by the evidence, I do not see how the court can interfere. I consider the issue as to the deceased not having been lawfully in the train, &c., as fairly disposed of by the finding on the evidence.

The learned Chief Justice of U. C., who tried the cause, reports his satisfaction with the verdict, and I am unable to place a dissent therefrom on any satisfactory ground.

I think the rule must be discharged.

*Per cur.*—Rule discharged,  
DRAPER, C. J., dissenting.

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The following gentlemen were called to the bar during this term:—ISRAEL N. WINSTANLEY, JAMES TILT, JOHN LEYS, ROBERT MORTIMER WILKINSON, RICHARD HENRY HOLLAND, ROBERT WILLIAM ADAMS, EDMUND JOHN SENKLER, JOSEPH DEACON, JOHN MACBETH, ALEXANDER MACNABB, SAMUEL HUME BLAKE, FREDERICK STEWART MACGACHEN, JOHN WEDGWOOD BOWLBY, FEATHERSTON OSLER.

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EASTER TERM, 23 VICTORIA.

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Present:

The Hon. WILLIAM HENRY DRAPER, C.B., C. J.

„ „ WILLIAM BUELL RICHARDS, J.

„ „ JOHN HAWKINS HAGARTY, J.

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WALES V. BULLOCK.

*Conveyance—Registry of after a judgment—How far good.*

*Held*, upon the authority of *Thirkell v. Patterson* (18 U. C. Q. B. 75), that a conveyance made by a debtor for a valuable consideration after the recovery and registry of a judgment against him was entitled to prevail at law in preference to the judgment, the court abiding by the decision of a tribunal of co-ordinate jurisdiction till that decision is overruled in appeal.

This was an action of ejectment brought to recover the possession of the southerly half of lot number six, on the east side of Russel street, in the town of Sandwich, and also another part of the said lot.

The plaintiff by his notice claimed title by deed made by John McEwen, sheriff of the county of Essex, to the plaintiff, dated the 26th day of October 1859.

The defendant limited his defence to the southerly half, and besides denying the title of the plaintiff thereto, in his notice of defence asserted title in himself by virtue of a deed made to him by Thomas Woodbridge, dated the 27th day of March 1856.

The cause was tried before *Richards, J.*, at the last spring assizes in and for the county of Essex, when a verdict was found for the plaintiff, with 1s. damages and costs of suit, subject to the opinion of the court upon the following case:—

It was admitted and agreed at the trial that Thomas Woodbridge, before and at the time of the judgment under which the sheriff's sale took place, was the owner in fee of the land in dispute, and that his title was a registered one.

It was proved that a judgment was, on the 10th day of November 1855, obtained against the said Thomas Woodbridge, at the suit of Isaac Buchanan and Benjamin Harris, in the Court of Common Pleas, for £500 and £3, 14s. costs, and that the said judgment was duly registered on the 13th day of November 1855.

That a writ against lands was thereupon placed in the hands of the said sheriff of Essex on the 20th day of October 1856, and that upon a writ of *venditioni exponas* subsequently issued, and after frequent adjournments, the land in dispute was, by sheriff's sale on the 22nd day of October 1859, sold to the plaintiff, and the sheriff's deed, under which plaintiff claimed, thereupon given on the 26th day of October 1859.

It was admitted by the defendant that all the proceedings upon which the sheriff's sale was made were legal and regular, and the sheriff's deed purported to convey all the interest which the said Thomas Woodbridge had in the premises at the time of the registry of the judgment, on the 13th day of November 1855.

On the part of the defence it was proved that Thomas Woodbridge made a deed of the land in question to the defendant on the 27th day of March 1856, for valuable consideration, which deed was not registered until the 16th day of February 1858.

The question for the opinion of the court was, whether the sheriff's deed so made as aforesaid was entitled to prevail, and the plaintiff was entitled to recover thereon at law against and notwithstanding the deed to the defendant so made as aforesaid?

*O'Connor*, for plaintiff, cited *Thirkell v. Patterson*, 18 U. C. Q. B. 75.

*Prince* for defendant.

DRAPER, C. J.—Woodbridge was seised in fee of the land in question; his title was registered.

On the 10th of November 1855 Buchanan and Harris recovered judgment against him in this court.

On the 13th of November 1855 this judgment was duly registered.

On the 20th of October 1856 a *fi. fa.* on this judgment against lands was placed in the sheriff's hands.

On the 22nd October 1859 the sheriff sold the land and conveyed it to the plaintiff, who registered his deed on the 26th of October 1859.

On the 27th of March 1856 Thos. Woodbridge sold and conveyed this land to the defendant for valuable consideration.

On the 16th of February 1858 the defendant registered this deed, so that at the date of the registration of the judgment Woodbridge was seised in fee, and conveyed the land in question to the defendant for valuable consideration before the *fi. fa.* was put into the sheriff's hands, but after the judgment was recovered and registered, and the deed was registered before the sheriff sold under the writ of *fi. fa.*

The only difference between this case and that of Thirkell v. Patterson, 18 Q. B. U. C. 75, appears to be, that there the judgment debtor conveyed his land after the recovery of the judgment against him, and before the registration of that judgment, while in the present case the judgment debtor did not convey until after the recovery and registration of the judgment.

The judgment having been recovered *before* the conveyance, the principle enunciated by the Chief Justice of Upper Canada applies, viz.: that the stat. 13 and 14 Vic., ch. 63, s. 3, only avoids conveyances against *subsequent* judgment creditors.

And as this judgment debtor conveyed *before* the execution against lands came into the sheriff's hands, according to the opinion of my brother Burns the creditor could only proceed in equity to enforce the charge created on the land by the recovery and registration of the judgment.

As the Court of Queen's Bench held that the conveyance by the debtor made after the recovery of the judgment, and not registered until after the judgment had been registered, must prevail in law, I think we should follow that decision. If the plaintiff is dissatisfied, he can carry the case into the court of appeal.

Judgment for defendant.

## WHITE V. NELSON.

*Landlord—Tenant—Lease.*

The defendant in an action of ejectment claimed title as tenant of the party through whom plaintiff claimed, by virtue of letters under the terms of which he (the defendant) was entitled to possession for ten years upon certain conditions which he had performed.

*Held* that he thereby obtained a yearly tenancy, and was entitled to six months' notice to quit.

EJECTMENT for lot No. 13, 5th concession of Walpole. Writ dated the 22nd of January 1859. Defence for the south 50 acres of the north half of the lot. The plaintiff claimed title under an indenture of bargain and sale dated the 13th of November 1858, to himself from one James Kirkwood. The defendant claimed title as tenant to Kirkwood.

The case was tried in May last at Cayuga before *McLean, J.* The plaintiff put in a deed, from James Kirkwood and wife, of the lot in question in fee. On the defence two letters from James Kirkwood to defendant were put in, admitted to be in Kirkwood's writing—the first, dated the 25th of May 1852, and written from the lot in question, containing the following passage:—"Here you would not require to be idle a day for want of work of one kind and another, and for a house to yourself and family. I would give you the use of as much land as you could clear, say, for 6 or 8 years, and allow you a little for clearing it besides, upon which you could erect a house, and through time might gather about you considerable of stock of one kind and another. Lately I got a little money from home, and intend this fall to sell my oxen and buy a pair of horses and waggon, and next summer I intend to summer fallow 12 or 14 acres and put into wheat. This, if you were to come up here, you could probably put in for me on shares. If you do make up your mind to come, which I hope you will if you do not get a better offer where you are, I would advise you to come as soon after harvest as you can, in order to have time to put a house up and all made snug before the cold weather comes on; and with regard to the house, if you allow me to be the boss over the raising of it,

it will cost you very little outlay in dollars. I can manage such matters better now than when I came here first." The other, dated the 25th of September 1852, containing the following passage:—"We are glad to think that we are to have you and Mrs Nelson beside us. You mention that you should like a little longer time for the use of the land that you might clear than what I mentioned in my last letter. I am inclined to be as liberal to you as I can afford, and on second consideration am disposed to extend the time to ten years—that is, the use of 50 acres for ten years, say 40 acres to clear and 10 to be left in woods, but with the allowance of time I could not promise anything for clearing the land. Ten years is a good chunk of a man's lifetime, and in that time you may do something considerable to the good if you look sharp, as I have no doubt you will. If I understand your letter right, you have fully fixed to come, and should there have nothing come in the way to alter your determination when this reaches you, I may mention that there is no time to be lost in coming, as the winter is fast approaching. Until you could get your house raised, you, Mrs Nelson, and daughter would, of course, live with us." It was sworn that the defendant was on fifty acres of the lot in question, had put up a log house, and had cleared about 30 acres. He went into possession some years before Kirkwood left the settlement, and has remained there ever since. The 100 acres of which Kirkwood retained possession (for he sold 50 acres of the 200) are now in the possession of John Miles, who entered soon after Kirkwood left for California. For the plaintiff, John Miles was called, who said he had bargained with the plaintiff for the 150 acres, 50 being in defendant's possession, and had paid plaintiff \$3000, having still \$500 to pay, and the plaintiff is to convey to him. He swore this action was not brought by him. He moved on to the place on the 13th December 1858, and on the 25th December, by the plaintiff's desire, he went to defendant and demanded possession in plaintiff's name, and he demanded possession a second time before this action was brought. The defendant refused to give up possession, stating he held the premises by agreement with

Kirkwood, and shewing Kirkwood's letter; but on the last occasion he said he would leave if he were paid for the residue of his term. Miles swore he knew nothing about defendant's claim when he agreed for the purchase. It was agreed a verdict should be taken for defendant, with leave to plaintiff to move to enter a verdict for him if the court should consider him entitled to recover in this action.

In Easter Term *M. C. Cameron* obtained a rule *nisi* to enter a verdict for the plaintiff on the leave reserved. The rule was also drawn up for a new trial, the verdict being contrary to law and evidence, and for misdirection in charging that the letters put in at the trial, and the dealings between the parties, constituted the defendant a yearly tenant.

*E. Martin* shewed cause. He cited *Doe v. Coutts*, 5 Old Series, U. C. 499, in which the court, under circumstances somewhat similar, held that the defendant was a tenant from year to year, and entitled to six months' notice to quit. *Doe v. Morse*, 1 B. & Ad. 365.

*M. C. Cameron* cited Con. Stat., ch. 90, sec. 4, and *Berrey v. Lindley*, 3 M. & G. 512.

DRAPER, C. J.—The statute of the province provides (Consol. Stat., ch. 90, sec. 4) that a lease of land required by law to be in writing shall be void at law unless made by deed. [This statute came into force in 1851.]

A similar statute in England has received the construction that it makes such leases of land as must be in writing, and are not made by deed, void as leases, leaving the effect in all other respects as it was before the statute was passed. *Tress v. Savage*, 4 E. & B. 36.

There is no doubt that the defendant has no right to a term. He is at most tenant from year to year. Having set up his claim under the letter of the 25th of September 1852, it may, I think, be fairly assumed his holding commenced upon and from that day, and he was to pay rent by clearing the land. The utmost he can claim is six months' notice to quit, expiring at the end of any year that he holds

as tenant. To this I think him entitled, and am therefore of opinion this rule should be discharged. I do not understand how the rule was drawn up in the alternative. I have no recollection of our being asked for more than a rule to enter the verdict for the plaintiff on leave reserved. The verdict was taken for the defendant by consent of both parties. We certainly should not have granted a rule for a new trial on the ground of misdirection under such circumstances.

*Per cur.*—Rule discharged.

### PIERCE V. SMALL.

*Contract for sale of land—Acceptance of—Mailing answer.*

Upon an action brought for breach of an agreement in not conveying land, the following letter was proved in evidence:—"I have concluded to let you have the south half of the north half of lot No. 2, in the first concession of Scarborough, say 50 acres, more or less, for \$3000—one thousand down, one thousand on the first of June next (1860), and one thousand on the first day of June 1861, the same bearing interest at six per cent.," &c. Signed by defendant; and that an answer was mailed, which it appeared had not come to hand.

*Held* that the above letter contained evidence to shew that an offer had been made to which it was a reply, and an agreement to sell, and was sufficient with the proof of the mailing of a reply (as to when plaintiff would be up, &c.) to sustain an action for damages arising from the breach of the contract; and as to damages, the defendant having wilfully broken his agreement (which was accepted within a reasonable time by posting an answer) by selling to a third party at an increased price, *held*, to make the case an exception to the generally established principle (of fraud being necessary to recover damages), and that the verdict for the plaintiff was correct.

*Hagarty, J.*, dissenting.

DECLARATION stated that by an agreement between plaintiff and defendant, defendant agreed to sell to plaintiff the south half of the north half of No. 2, 1st concession of Scarborough, containing 50 acres, for \$3000 to be paid by plaintiff—\$1000 down, \$1000 on the 1st of June 1860, and \$1000 on the 1st of June 1861, with interest, and that defendant, immediately on receiving the first sum of \$1000, should execute and deliver to plaintiff a good and sufficient deed in fee-simple of the premises. Averment of readiness and offer to perform by plaintiff, of which defendant had notice. Breach—refusal to perform agreement, and a sale by defendant to one J. B. for £2000, to plaintiff's damage.

*Pleas.*—1. Denying the agreement. 2. That plaintiff was not at all times ready and willing to do and perform his part as alleged. Issue.

The case was tried at the last Toronto winter assizes, before *Burns, J.* The plaintiff put in two letters addressed to himself by defendant, which were admitted. The first was:—"Toronto, 8th November 1859. Mr John Pierce. Dear Sir,—I have concluded to let you have the south half of the north half of lot No. 2, in the 1st concession of Scarborough, say 50 acres, more or less, for \$3000—one thousand down, one thousand on the first day of June next (1860), and one thousand the first day of June 1861, the same bearing interest at six per cent. You must pay for the writings, which will cost four dollars. If you are married let me know the christian name of your wife, and the day you will be up, when the deeds shall be ready. Yours very truly, Cha. C. Small."

The second:—"Toronto, 14th November 1859. Mr. John Pierce. Sir,—Not having heard from you in answer to my letter addressed to you on the 8th instant, I have now to inform you that you have lost the chance of my lot in Scarborough. I have this day sold the 100 acres to Jacob Banwell. Your obedient servant, Charles C. Small."

The postmaster of Highland Creek (about 10 or 12 miles east of Toronto) proved that plaintiff enquired for a letter from defendant as he said, and the postmaster handed him one. The plaintiff brought to the postmaster a letter addressed to defendant, which he said was an answer to the one he had received, which he had got a day or two before. (Notice to produce this answer admitted.) This letter left Highland Creek for Toronto on the Monday morning; it was brought to the post-office on Saturday, but too late for that day's mail. The 14th of November 1859 was on Monday. This, with evidence as to damages, was the plaintiff's case.

For defendant it was objected that there was nothing to go to the jury. It was answered for plaintiff that defendant's letter of the 8th of November was the acceptance of a

proposal previously made, from which defendant could not recede without a reasonable interval. The defendant's counsel insisted his letter was an offer only, which required to be accepted by plaintiff, and there was no proof of that acceptance. The learned judge treated the letter as an acceptance of a previous offer, but reserved leave to defendant to move for a nonsuit, and left it to the jury to say whether a reasonable time had elapsed after defendant had thus signified his acceptance of the bargain for plaintiff to perform. If not, plaintiff was entitled to recover. The jury found for plaintiff, damages £62, 10s.

In the present Hilary Term *Galt* obtained a rule *nisi* for a nonsuit on the leave reserved, or for a new trial on the law and evidence and on account of excessive damages.

*Harman* shewed cause. He cited *Western v. Russell*, 3 Ves. & Beames, 187, to prove that the letter of the 8th of November was an acceptance of a previous proposal, containing a sufficient agreement under the statute of frauds to bind the defendant, and that specific performance in that case would not be refused, though there was no agreement signed by the plaintiff. *Duncan v. Topham*, 8 C. B. 225, and the cases therein referred to, prove that a letter *accepting the contract* put into the post-office made it complete and binding, although it might never have come to the defendant's hands. As to damages, he referred to *Powell v. Jessopp*, 18 C. B. 336. He cited also *Meynell v. Surtees*, 1 Jur. N. S. 737; *Laythorp v. Bryant*, 2 Bing. N. C. 735; *Kennedy v. Lee*, 3 Mer. 441; *Dunlop v. Higgins*, 1 H. of L. Ca. 381; *Boys v. Ayerst*, 6 Madd. 316; *Potter v. Sanders*, 6 Hare 1; *Hadley v. Baxendale*, 9 Ex. 341.

*Galt*, contra. The plaintiff's letter to defendant has since been found in the post-office at Toronto. When discovered, it was upon a search made at the instance of the defendant, and the clerk of the post-office stated it had not been put into the defendant's private box at the post-office, because he (the clerk) had been unable to decipher the address. This was stated on affidavit, read without objection, and the letter was as follows:—"Pickering, 11th November 1859.

Mr. C. Small. Dear Sir,—You mention in your note about me appointing the day to come up; as for that, I cannot as yet for a few days. My father is gone up west. I expect him back the first of the week, when we shall be up. The name of my wife is Sarah Ann. Yours very truly." (Signed) "John Pearce." *Galt* argued that this did not contain an acceptance of Mr. Small's proposal. He referred to *Routledge v. Grant*, 4 Bing. 653, which he distinguished on the ground that there the mistake was that of the party charged; here it originated with the plaintiff's addressing the letter badly. He referred also to *Adams v. Lindsell*, 1 B. & A. 681; *Cooke v. Oxley*, 3 T. R. 653.

DRAPER, C. J.—In my opinion, the letter of the defendant of the 8th of November 1859 contains strong internal evidence that an offer had been previously made, to which this letter was a reply, and an agreement to sell; and the answer of the plaintiff now before us contains strong evidence corroboratory of this view. It has not the character of an acceptance of a proposal for the first time made, but as if all that remained was to execute what had been previously offered, and which defendant had accepted. The defendant's first letter does not mention security by mortgage, yet it obviously contemplates it, and the plaintiff's answer as obviously refers to it as a foregone conclusion, for it is plain he understood why it was necessary to communicate the name of his wife. If it were necessary to rely on this letter as proof of an acceptance of the defendant's proposal, treating the letter of the 8th of November as a proposal only, I should be prepared to hold this answer of the plaintiff's as an acceptance. He refers to defendant requiring him to come up "when the deeds will be ready," and replies that he expects his father back "the first of the week, when we will be up," sending his wife's name that it might be inserted in the mortgage to be given to Mr. Small.

But on referring to the evidence on the subject of damages, it appears manifestly that it almost exclusively was directed to the value of the bargain, and that plaintiff sought to recover the loss of anticipated profit as damages. In a

case like the present I think this a doubtful point. As far as authority goes, it is perhaps against such a pretension. The cases were referred to in *Vallier v. Walsh* (6 C. P. U. C. 459) in this court, and the general rule I take to be that in the absence of fraud no damages can be recovered for the goodness of the bargain which the plaintiff fancies he has lost. In *Sugden's V. & P.* (13th ed. p. 300) it is said the purchaser "will, according to the counts on which he recovers, obtain a verdict either for his deposit or damages, which in most cases would be regulated by the amount of the deposit." The only exception to that rule seems to be grounded on *mala fides* on the part of the vendor, that his conduct must amount to fraud, as, for instance, entering into a contract to sell where he knew he had no title. And in *Pounsett v. Fuller* the observations of the judges seem to shew that they treat the exception to the general rule introduced by *Hopkins v. Grazebrook* (6 B. & C. 31) as founded solely on the ground that the defendant's conduct was evidence of or amounted to fraud, and on this view *Vallier v. Walsh* was decided. If we hold that this was a complete agreement by the defendant's letter of the 8th of November, or that the plaintiff's letter of the 13th of November was an acceptance sent within reasonable time, and being sent by post was a sufficient notification to the defendant, I do not see how we can treat the defendant's selling the land at an increased price to a third party otherwise than as a wilful breach of the contract on his part, and therefore as bringing him within the exception to the rule originally established in *Flureau v. Thornhill* (2 Bl. 1078), and upheld in all the subsequent cases.

On this ground I think the rule must be discharged.

RICHARDS, J., concurred with the Chief Justice.

Rule discharged, *Hagarty, J.*, dissenting.

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## GOUGH V. MCBRIDE.

*Memorial—Signed by grantee—Not alone proof of original instrument—Possession.*

*Held* that proof by a witness that he saw a deed apparently answering the description contained in the memorial, and its loss; without further proof of handwriting or genuineness, a memorial in the county register executed by the grantee only, and proved by an affidavit endorsed of a witness who swore that he saw the conveyance duly signed by the grantor, is, in the absence of any act done or possession taken for a long series of years, not good secondary evidence of the original conveyance.

This was an action of ejectment for lot 25, 7th concession, York. Plaintiff claimed as heir-at-law of Thomas B. Gough, who claimed by deed from Samuel Arnold and Dorothy his wife, which Dorothy was patentee of the Crown. Defendant claimed by deed from John McBride.

It was tried before *Hagarty, J.*, at last Toronto assizes. Patent was proved 27th May 1807. Notice to produce deed to Gough admitted, and plaintiff called John McBride, who swore he never had such a deed.

John Montgomery swore he once bought the land from a Mrs. Barrett; that she was in possession about 1812; she had one son; he thought she had only a life estate; he bought it from her son after her death. This son was in possession and gave witness a deed, which he had 4 or 5 years, purporting to be a deed of this land from Samuel and Dorothy Arnold; this deed he last saw two or three years ago; he missed it, and it cannot now be found. John McBride afterwards told witness he had it; witness either gave it to him or lost it; thinks McBride has it; did not know writing of any of the parties.

Cross-examination.—Barrett gave witness a deed from T. B. Gough to his mother (this was not produced or accounted for). The Barretts paid taxes on this lot, but were not in possession; witness was told by an attorney that the title got from the Barretts was good for nothing; witness mortgaged the land with other land to McBride; this land only cost witness £1, 10s.; it was about 1850 that this witness bought the land from young Barrett; plaintiff was proved to be heir-at-law of Thomas B. Gough.

The plaintiff then sought to prove the deed by secondary evidence, and the registrar of the county of York produced

an original memorial of a deed dated 25th May 1807, from Samuel Arnold and his wife Dorothy to Thomas B. Gough of this land. Affidavit of John Cameron as to execution of deed by grantors endorsed on memorial and certificate of C. J. Scott that Dorothy barred her estate. The memorial was executed by the grantee.

Defendant objected that there was no sufficient evidence of the deed to plaintiff's father, and secondary evidence was not admissible. The learned judge ruled that the evidence was insufficient to establish plaintiff's case. Plaintiff took a non-suit on this ruling, with leave to move.

In Easter Term *J. R. Jones* obtained a rule to set aside the nonsuit for misdirection.

*E. C. Jones* shewed cause, citing *Lynch v. O'Hara*, 6 U. C. C. P. 259; *Marvin v. Hales*, same vol. 208; *Sadlier v. Biggs*, 4 H. of L. 435; *Doe v. Clifford*, 2 C. & K. 448.

*J. R. Jones* in support of rule referred to *Doe Maclem v. Turnbull*, 5 U. C. Q. B. 129.

HAGARTY, J.—No possession appeared to have been taken under the alleged conveyance, and the title is now for the first time after a lapse of 53 years sought to be established to a valuable property on this evidence.

The plaintiff's proposition may be thus stated, that on a witness proving that he saw a deed apparently answering the description contained in the memorial, and its loss, without further proof of handwriting or genuineness, a memorial in the county registry executed by the grantee only, and proved by an affidavit endorsed of a witness who swore that he saw the conveyance duly signed by the grantor, is, in the absence of any act done or possession taken, good secondary evidence of the original conveyance, and that a court and jury should be reasonably satisfied of the fact of such a deed having been duly executed, and that the estate duly passed thereunder. The proposition is startling, and can hardly be adopted except on the surest basis of reason and authority.

The first case I would refer to is *Scully v. Scully*, 10 Irish Eq. Repts. 557, appealed from the Irish Chancery to the Lords, 1825.

In 1816 a bill was filed setting up a marriage-settlement executed in 1760, of which a memorial was registered in 1763. James Scully was alleged to have thereby covenanted with Lyons, father of the plaintiff, to settle on her (his intended wife), either by deed in his lifetime or by will, one third of his estate. The memorial was only executed by Lyons, the trustee. No deed was executed in grantor's lifetime. He died in 1816, and by his will left a large annuity to plaintiff "in full satisfaction of her claims on his property under her marriage articles or otherwise." She filed a bill asking to have her one-third under the articles. The defendant induced her to sign a memorandum on the will agreeing to confirm and abide by it. She charged that one Mahon, who took largely under the will and was residuary devisee, had possession of the articles or knew where they were, and evidence was given to prove search, and that Mahon had declared he had either burned or thrown them away. The defendant admitted that they knew she claimed some right to testator's property in his lifetime, but that she had solemnly assured him that she would waive all her rights and abide by his will on receiving the annuity of £1000, and testator on the faith thereof made his will.

Lord Chancellor *Manners* decreed in her favour, and considered the articles proved. In the Lords the case is argued at great length by Mr *Sugden* and Sir *C. Wetherall*. Lord *Eldon* says :—"The question in every case of this sort is, whether all the testimony taken together, offered as secondary evidence, is or is not sufficient to enable you to say that as you have not the writing itself you will act upon it as if you had it before you, and with an absolute certainty of what these articles contained. It is strongly the inclination of my opinion that this memorial does contain what were the articles of agreement between the parties." Again, he says :—"There is not a single witness who speaks to conversations between plaintiff and testator, who does not characterise him as proposing to her a choice of what was in the will, or a one-third of the property as stated in the articles."

The defendant's counsel admitted in argument—"that the husband executed an article I cannot deny, for I cannot deny what the will says." The decree was affirmed.

In 1837 the case of *Peyton v. McDermott*, 1 Drury and Walsh, 198, was decided by Lord Chancellor *Plunket*. It was attempted to set up marriage articles executed in 1765. The Chancellor says :—" I find possession going along with these articles. Again, I have strong evidence under the will of H. O'Rorke (the settlor) of the existence of these articles, as by a reference to them the otherwise apparent obscurity and confusion in that will and its limitations are explained and rendered plain." This was a very peculiar case in its facts.

The case of *Sadlier v. Biggs*, decided in Ireland in 1847, 10 Irish Eq. Reports, 522, enters very fully into the law on this head. It came before the House of Lords in 1853, 4 H. L. 435 ; a memorial signed only by grantee was recorded in 1746. For one hundred years possession had gone in accordance with the facts recited. The question was whether the original lease, of which it professed to be a memorial, contained a clause for perpetual renewal on the dropping of lives. Many renewals had been made under it from time to time. Proceedings had been taken to enforce a renewal in 1799, and a renewal obtained.

Lord *St Leonard* says :—" It has been made a great question in reference to the memorial, which is signed only by the party who takes the interest, whether that of itself by its own force shall be considered as binding the estate of the grantor ? That is a totally different question from that which is now before your Lordships, because here the question is, whether or not the memorial can be considered as secondary evidence of the contents of the instrument of 1746, and considering the length and nature of the deeds by which it has been recognised, and considering the statute itself under which that memorial was enrolled, and the proof which accompanies that memorial, and bearing in mind, too, that of course every memorial is signed by the person who takes the interest, because it is he, and not the grantor, who wants the protection of the register, I certainly am of opinion, and I think the authorities will not impeach that opinion, that this memorial is good secondary evidence of the contents of the

deed of 1746, it being proved upon search that the deed has actually been lost."

After noticing the formal proof required by the Registry Act, he continues:—"Then the question is, the deed being lost and the possession having gone for a century according to that deed, whether or not that memorial is secondary evidence of its contents. I confess I should be ashamed of the law of England if such evidence as that could not be received from necessity as secondary evidence."

In *Doe Loscombe v. Clifford*, 2 C. & K. 452, *Alderson*, B., rejected the memorial as any secondary evidence. He says—"The memorial is only evidence against the persons who register. I think that if there is no clause in the act of parliament making the memorial evidence, it is only evidence against the persons registering and those who claim under them." See also *Wollaston v. Hakewill*, 3 M. & G. 297.

In *Buller*, N. P. 254, it is said—"When possession has gone along with a deed for many years (the original being lost or destroyed) an old copy or abstract may be given in evidence without being proved to be true, because in such a case it may be impossible to give better evidence."

Lord *Redesdale* says, in *Bullen v. Michel*, 4 Dow 325—"When a record is lost from accidental injuries, an inference is always drawn from the secondary evidence of other circumstances, from which a jury is called upon to presume that of which no direct evidence can be shewn."

In *Taylor on Evidence*, vol. i. 362, it is said:—"On one or two occasions the memorial, or even an examined copy of the registry, has been received as secondary evidence of the contents of an indenture, not only as against parties to the deed who have had no part in registering it, but also as against third persons; but in all these cases the evidence has been admitted under special circumstances, as, for instance, where parties have been acting for a long period in obedience to the provisions of the supposed instrument, or where the deed has been recited or referred to in other documents admissible in the cause."

I am not aware that our Canadian courts have pronounced

any opinion supporting the plaintiff's proposition, or at all at variance from the rule to be deduced from the authorities above referred to.

The solitary fact that fifty years ago a memorial appears duly registered by Gough, the grantee, apparently proved by a witness as referring to a deed which he swears he saw executed by the grantor, shews to us that Gough then apparently asserted title to these premises. The land is not in any remote situation, but in York township, close to the capital of Upper Canada. Had the evidence shewn that possession was taken within any reasonable time after, and that Gough and his descendants acted as the owners of the land in apparent accordance with the title asserted in the Registry Office, and to the knowledge of the grantor, who allowed long years to elapse without objection, the strong presumption might be raised that the title was as the memorial asserts. The conclusion drawn by Pigot, C. B., in *Scully v. Scully*, would be applicable:—"I think the inference is so cogent as to be almost irresistible that the possession of the land was influenced by a contract corresponding in import with that contained in the articles of which the document purports to be a memorial."

But when we find the Gough family abstaining for half a century from doing any act to gain possession of valuable land, and late in 1859, for the first time, bringing ejectment on title said to be acquired in 1807, the inference, to my mind at least, "is so cogent as to be almost irresistible" that the claim is utterly lacking in all those evidences of good faith and substantial right required by courts of justice in the formal proof of title to landed property.

A long undisturbed possession by the Goughs to the knowledge of the alleged grantors, who thus acquiesced in the long enjoyment of this estate by another, naturally suggests the presumption that such possession is of right. If we found the additional fact that the possessor affected to be the absolute owner, as by conveying to another in fee, &c., &c., it would heighten the presumption.

Our minds are first led to the belief that there was a right for all this, and then we are led on to infer from all the cir-

cumstances that the right was, as is set forth in the memorial, publicly placed on record with all statutable requirements as a formal assertion of title by the grantee. We thus are led to believe that the long undisturbed possession and acts of ownership were based on this foundation of right.

Such a conclusion strikes my mind as analogous to that class of cases in which inferences are drawn from the silence of persons who listen without objection or dissent to the assertions of title by another derived from them, and who afterwards permit such other to obtain possession and use the property so claimed for years without objection.

In this way the facts all combine to make up evidence directly affecting the alleged grantor, and making the presumption convincing that the claim is as the grantee asserts.

My opinion is that the plaintiff wholly failed to make out any case for a jury—that his evidence only proves that his ancestor fifty years ago asserted a claim to this land by his own written declaration and the oath of a witness in the registry office; that he never pursued his alleged right; and that it would be contrary to all authority, and tending to establish a most dangerous precedent, if such evidence be held sufficient to give title to an estate.

I think the nonsuit was right. In the view I have taken, it is unnecessary to notice at length the further strange feature in the case that the Barrett family seem to have claimed the land for many years, and that Montgomery states he received a deed from young Barrett purporting to be from T. B. Gough to his mother, which deed was not produced or accounted for.

*Per cur.*—Rule discharged.

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#### DANCE V. BURROWES.

*Venue—Demurrer.*

*Held* that an objection to a venue as being local was ground of general demurrer.

The declaration stated that the plaintiff, in the county court of the county of Brant, recovered a judgment against

one Thomas Burrowes, and thereupon issued out of the said court a writ of *alias ca. sa.* against him, upon which writ the sheriff of Wentworth arrested him, and returned *cepi corpus prout patet*, and thereupon and while Thomas B. Burrowes was in such custody the defendant and one Richard W. Burrowes, who is out of the jurisdiction, on the 7th of March 1856, came into the county court of the county of Brant and then became bail for the said Thomas B. Burrowes, and then undertook that he should remain and abide at the suit of Anthony Dance within the limits of the gaol for the county of Wentworth, and not depart therefrom until discharged by due course of law. Averment that Thomas B. Burrowes, after the making of the said recognizance by the defendant, did depart and escape from the said gaol limits, and hath continued to abide and still doth abide without the said limits. The venue in the margin of the declaration was laid in the County of Haldimand.

The defendant demurs because the action is upon a record of the county court of the county of Brant, and therefore local, yet the venue is in the county of Haldimand. That it is not shewn that the cause of action for which Thomas B. Burrowes was arrested was within the jurisdiction of the county court, nor does it appear that there was any legal or binding recognizance entered into by the defendant.

*Burton* supported the demurrer, referring to *Gibson v. Thomas*, 7 U. C. C. P. 163; *Read v. Pope*, 1 C. M. & R. 302; *Wragg v. Jarvis*, 5 U. C. Old Series, 113; *Munson v. Hamilton*, *ib.* 118; *Simmons v. Lillystone*, 8 Exch. 431; *Thursby v. Plant*, 1 Saund. 241, N. 6; *Manning v. Proctor*, 7 U. C. Q. B. 22; *Smith v. Russell*, 8 U. C. Q. B. 387; *McFarlane v. Allen*, 4 U. C. C. & C. 438.

*A. Crooks*, *contra*, cited *Saunders' Pleading*, vol. i., p. 915; and *Thursby v. Plant*, 1 Saund. 241, N. 6.

DRAPER, C. J.—It is not denied that the venue is local; that it must be laid in the county where the record is. And here the objection appears on the face of the declaration, for it appears that the defendants came into court and entered

into the recognizance in the county court in the county of Brant, and the venue is in the county of Haldimand. Mr. Crooks urged that it was only a ground of special demurrer, and would be cured by the 16 & 17 Car. 2, ch. 8. But the court sustained the objection on general demurrer in *Mayor of Berwick v. Shanks*, 3 Bing. 459; and *Thrale v. Cornwall*, 1 Wils. 165; and *Mayor of Berwick v. Ewart*, 2 W. B. C. 1038, seem to be decided in the same way. And Mr. Chitty, in his work on Pleading, tit. Venue, says that the only modes of objecting to the venue, even in local and penal actions, are by demurrer or at the trial, as a ground of nonsuit.

I think the defendant should have judgment.

Judgment accordingly.

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### BALL (ADMINISTRATOR) V. GOODMAN.

#### *Seduction—Survival of action to administrator.*

*Held* that a right of action for seduction does not survive to the administrator of the original plaintiff, and further that damages occasioned to the estate in the nursing and attending of the defendant did not entitle the administrator to continue the action.

This action was brought by Harriet Chisholm against the defendant for the seduction of Harriet Josephine, her daughter and servant, by writ issued on the 22nd of February 1859. Not guilty was pleaded, and issue joined. On the 15th of March 1860 a suggestion was entered by leave of *McLean*, J., by W. W. Ball, that after the joinder of issue Harriet Chisholm died, and that he was appointed her administrator. To this suggestion the defendant demurred, because—1. The cause of action is not one which survives to the administrator within the meaning of the stat. 4 Edw. III., ch. 7, and that the 210th sec. of the C. L. P. Act 1856 applies only to such actions as previous to the passing of that statute survived to the personal representatives of a deceased plaintiff, and was only intended to avoid the necessity of commencing a new action in the name of the personal representatives, and was not intended to confer on such representatives any new rights. That the effect of such suggestion is the same as if the personal representatives were the plaintiff in the action. There was also a rule *nisi* to set aside the order of *McLean*, J.

*Anderson* supported the demurrer. He cited a decision of Sir *J. B. Robinson* in chambers, in a case of *Thompson v. Ward*; *Broom's Legal Maxims*, 818; *Beckham v. Drake*, 2 H. of L. Ca. 626; 13 Jur. 921, S. C.; *Williams on Executors*, 706 *et seq.*; *Lockier v. Paterson*, 1 C. & K. 271.

*Harman*, contra, referred to the Consol. Stats. C. L. Procedure, sec. 133; *Chamberlain v. Williamson*, 2 M. & S. 408; *Archbold's Prac. by Chitty*, 1473; *Peterson v. Davis*, 6 C. B. 235; *Watson v. Quilter*, 11 M. & W. 760.

DRAPER, C. J.—The principal question in this case is whether the cause of action survives to the administrator of the original plaintiff after her death.

The well-known case of *Chamberlain v. Williamson*, 2 M. & S. 408, is a strong authority for the defendant. It was an action founded on a breach of promise to marry—a contract—but the court held that this declaration, which was in the common form, not alleging any special damage, imported only a personal injury to which the plaintiff as administrator was not by law, nor was he in fact, shewn to be privy; the action was not maintainable; though the loss of marriage might under circumstances occasion a strict pecuniary loss to a woman, it does not necessarily do so, and unless it be expressly stated on the record by allegation, the court cannot intend it.

The administrator represents not so much the person as the personal estate of the intestate, and this case establishes that although the action be in form *ex contractu*, still if it be in substance for a wrong, which neither by implication of law nor by averment on the record operates to the injury of the personal estate, no action will lie. It falls substantially within the maxim of the common law *actio personalis moritur cum personâ*. But an action for seduction is in form and substance an action for a tort, not to the personal estate, for the loss of service is frequently a legal fiction, but to the personal feelings of the plaintiff. If the right to the service of the daughter, and the loss of such service consequent on the seduction, could be looked upon as an injury to the personal estate, this attempt of the administrator to carry on

the action would not be of the first impression. It cannot be supposed that occasions have not frequently arisen when the personal representative of a deceased parent would have instituted or sought to continue an action like the present if it had been considered maintainable. But it has been urged that the allegation in the declaration that the intestate incurred expenses in and about the nursing of the daughter and the delivery of the child, and that an injury to the personal estate was therefore alleged as part of the result of the defendant's wrongful act. It may be well to consider the footing upon which the claim to damages in an action like the present rests. In *Bedford v. McCowl*, 3 Esp. 119, Lord *Kenyon* said—"In point of form the action only purports to give a recompence for the loss of service, but we cannot shut our eyes to the fact that this is an action brought by the parent for an injury to her child; in such a case I am of opinion that the jury may take into consideration all that she can feel from the nature of the loss. They may look on her as losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation, and as the parent of other children whose morals may be corrupted by her example." And in *Southernwood v. Ramsden*, cited from M. S. in *Selwyn*, N. P. 1106, Lord *Ellenborough* said—"That proof of the loss of service was necessary to let in the case, but after this further damages might be conceded for the loss which the father sustained by being deprived of the society and comfort of his child, and by the dishonour which he receives." So, in *Chambers v. Irwin* (*Selwyn*, *ubi sup.*) Lord *Eldon* told the jury they were not to look merely to the loss of service, but also to the wounded feelings of the party. All this is strengthened by the consideration that where the action for seduction is brought either by the father or the mother, it is by our statute made unnecessary to give proof of any acts of service, but the same shall in all cases be presumed, and no proof can be received to the contrary. But if the personal representative were plaintiff, he could not be permitted to recover damages on the grounds above suggested, which form with us the principal foundation of

the damages which the parent recovers; and if it were admitted that the expenses attending the confinement, &c., of the female seduced were a damage to the personal estate, the recovery by the administrator must be limited to a satisfaction for that damage. If, however, that limited right passed to the personal representative as appertaining to the personal estate, a similar right should pass to him for the loss of service, which might with almost equal reason be considered an injury to the personal estate. But no trace of authority can be found favourable to such a conclusion, and there is much adverse to it. Some assistance is to be gained from cases upon the question of what rights pass to the assignees of a bankrupt as part of a personal estate. The case of *Beckham v. Drake*, cited by Mr. *Anderson*, is of great value in this respect. In observing upon what rights do not pass, *Parke, B.*, enumerates actions of assault, for defamation, on the case for misfeasance, doing damage to the person, for trespass *qu. cl. fregit*, for criminal conversation with the wife, and for seduction of the daughter or servant; and he adds, "even though some of these causes of action may be followed by a consequential diminution of the personal estate—as where by the seduction the plaintiff has been put to expense"—referring to the case of *Howard v. Crowther*, 8 M. & W. 601, where that is expressly decided.

In the same case Lord *Brougham* speaks of "injuries which are merely personal to the bankrupt, in which the cause of action *moritur cum persona*, and would not pass to the executors;" and as instances he mentions among others "the seduction of a servant or a daughter."

I think we are warranted in principle and by authority in holding the cause of action does not survive.

As to the question whether the suggestion could be demurred to, it was conceded by Mr. *Harrison* that it might, and I see no good reason for holding the contrary. Our judgment therefore must be for the defendant. The order of Mr. Justice *McLean* would have been set aside if we had thought the suggestion not demurrable, as in our opinion the personal representative cannot maintain an action for

this wrong to the intestate. It is a matter of indifference to the defendant whether he has judgment on the demurrer or his rule is made absolute.

*Per cur.*—Judgment for defendant.

See *Mordant v. Thorold*, 1 Salk. 252; Com. Dig. Adm. B. 13; 1 Saund. 216, n. 1; *Chamberlain v. Williamson*, 2 M. & S. 408, which was breach of promise of marriage, *contract*; Con. Stats., ch. 78, does not seem to apply; *Ireland v. Champneys*, 4 Taunt. 884; *Griffith v. Williams*, 1 C. & J. 47; *Palmer v. Cohen*, 2 B. & Ad. 966, *after verdict*; *Paterson v. Davis*, 6 C. B. 236; *Watson v. Quilter*, 11 M. & W. 769.

## THE CORPORATION OF THE TOWNSHIP OF BEVERLEY v. BARLOW ET AL.

*Bond—Pleading—Period of appointment of Treasurer of a Township under 12 Vic. cap. 81—Right to impose further taxes without vitiating.*

The plaintiffs declare on a bond to "the Beverley Municipal Council" (there being no such corporation in existence); the defendants do not deny the making of the bond, but plead over on demurrer to the plea and objections to the declaration.

*Held* that by not pleading "*non est factum*" the defendants were debarred from taking the objection to the form of the bond as pleaded.

2nd. That the appointment of a treasurer under 12 Vic. cap. 81, is an appointment till removed, and not only for a year, and that a plea not averring the office (for the breach in the performance of the duties of which the action was brought) to have been an annual one at the time of the taking the bond was bad.

3rd. That the imposition of additional taxes to those assessed at the time of taking the security, and the increase of the risk thereby, did not vitiate a bond given for the general performance of duties and payment of all moneys.

DECLARATION on a joint and several bond, whereby defendants jointly and severally agreed and covenanted to pay plaintiffs, by the name of the Beverley Municipal Council, £800; if default should be made in the condition following, viz.: if Heman Gates Barlow, who had been chosen treasurer of the plaintiffs, by reason whereof he should and did receive into his hands divers sums of money, notes, chattels, and other things, the property of the plaintiffs, upon request should give to plaintiffs a true and just account of all such sums of money, &c., as should come into his hands or pos-

session as treasurer, and should pay and deliver over to his successor, &c., all such sums of money as should be in his hands due by him to plaintiffs, then, &c. Averment that the condition was not kept, but default was wholly made in the condition of the bond, whereby defendant became liable to pay the said sum to plaintiffs.

*Pleas*—1. That the condition of the bond was kept and performed. 2nd. That the bond was made on the 28th February 1853, and the appointment of the said Barlow as treasurer was an annual appointment as treasurer for the year 1853, and terminated at the end of the municipal year, and that Barlow as treasurer for that year did make and give to plaintiffs a true and just account, &c., as treasurer during the currency of his appointment for the year 1853, and did pay all sums, &c., as were in his hands, and due to plaintiffs during his appointment as treasurer for the year 1853.

The plaintiffs took issue on both pleas, and demurred to the second, because the bond was not limited in its effect as pretended in the plea.

The defendant excepted to the declaration—that it is asserted therein that the defendant covenanted with the plaintiffs by the name of the Beverley Municipal Council, and sought to set up a bond entered into by that name, whereas there is not, nor ever was, a corporation known as the Beverley Municipal Council, and the statute requires bonds for the faithful discharge of a treasurer's duties to be taken in the name of the corporation.

At the trial in November last, before Sir *J. B. Robinson*, C. J., at Hamilton, it was shown that from 1850 to 1853 Barlow was annually appointed treasurer.

On 21st February 1853 a by-law in the following words was passed:—

“Whereas it is expedient and necessary to appoint under the new act, 12 Vic., ch. 81, being an act to establish township councils in Canada West, we, the Municipality of the Township of Beverley, do hereby appoint the township officers under the above mentioned authority. Be it therefore enacted by the Township Council of Beverley that the

different persons appointed to the different township offices within the corporation of the township of Beverley do hold their respective offices for the present year."

By a by-law passed 6th June 1853 they voted the salaries of the township officers for that year. The treasurer was named in this by-law. Barlow continued to be treasurer without any new appointment after 1853. Evidence was given of the amount of Barlow's default, the taking the accounts was referred to an arbitrator, and the following questions were reserved for the court:—

1st. Was the liability of the defendants as sureties limited to the deficiency of Barlow for 1853, or did it extend during the whole time of his filling the office of treasurer?

2nd. Assuming that the liability of the defendants as sureties was otherwise coextensive in duration with the time for which Barlow remained in office, were the sureties liable for any moneys received by Barlow under 16 Vic., ch. 184, and 18 Vic., ch. 2, or either of them?

3rd. Assuming that the defendants are only liable for the deficiency of Barlow for the year 1853, would the fact that in 1854 the balance in his hands was reduced below the sum due at the end of that year, relieve the sureties *pro tanto* if the balance in his hands at the time of action brought exceeded the amount in his hands at the end of the year 1853.

*S. Richards* for plaintiff—demurrer and special case.

As to the declaration, it must be taken on these pleadings; the bond in question was made to the plaintiffs, though by the name of the Beverley Municipal Council—Grant on Corporations, 51; The Mayor and Burgesses of Lyme Regis, 10 Co. 122 B.; Re Barclay and The Municipality of Darlington, 11 U. C. Q. B. 470; Fisher v. The Municipal Council of Vaughan, 10 U. C. Q. B. 492; Re Hawkins v. The Municipality of Huron, Perth, and Bruce, 2 U. C. C. P. 72; Farrell v. The Town Council of London, 12 U. C. Q. B. 343; 13 & 14 Vic. ch. 67, sec. 60. This is merely directory. Judd v. Read, 6 U. C. C. P. 362; The Brantford Building Society v. Clement, 9 U. C. Q. B. 339; Webster v. Macklem, 4 U. C. C. P. 266; Cole v. Green, 6 M.

& Gr. 872; Reg. v. Leicester, 7 B. & C. 6; Reg. v. Birmingham, 8 B. & C. 29; Kitson v. Banks, 4 E. & B. 854; though the bond is general, the objection that the office is annual may be raised on the pleading—Mayor of Berwick v. Oswald, 3 E. & B. 653; Curling v. Chalklen. 3 M. & S. 502, shews that the appointment being created under an act of parliament, reference may be made to the act to see if plea be good, and on the face of the statute the defendant cannot allege the office was annual—Mayor of Birmingham v. Wright, 16 Q. B. 623; 12 Vic., ch. 81, and 171, 173.

The 2nd plea is put in issue. See the by-laws put in to show the appointment was made for a year only, and renewed each year. Three by-laws. The expression is "township officers;" that may refer to such officers as by statute are to be annually appointed.

These by-laws cannot vary the statute. The treasurer by sec. 173 must have held his office until removed, and the by-laws were superfluous and had really no operation. Sec. 31 of 12 Vic., ch. 81, as to passing of by-laws.

2nd. If the office of treasurer comes within these provisions. The continuing a man in office is not a removal and re-appointment, and there is no by-law subsequent to that for 1853. Bamford v. Iles, 3 Exch. 380; Frank v. Edwards, 8 Exch. 214; Mayor of Berwick v. Oswald, 3 E. & B. 653; Mayor of Clifton v. Silly, 7 E. & B. 97.

Then the defendants deny liability for certain moneys received by the treasurer, under statute 16 Vic., ch. 184, and 18 Vic., ch. 2, as to effect of office being varied—Pybus v. Gibb, 6 E. & B. 902; but here no variance by adding certain moneys which were to come to his hands—12 Vic., ch. 81, sec. 172.

*Anderson* on same side. Thompson v. McLean, 17 U. C. 495, is the case on which defendants will rely; it is to be distinguished by the fact of the 172 sec., 12 Vic., ch. 81. Pybus v. Gibb, 6 E. & B. 902, also suggests a further distinction. If plaintiff had replied instead of demurring, we could only have replied, the statute—which is matter of law, not of fact—to be submitted to a jury.

*Irving* contra. The cases as to by-laws cited are not applicable. Insists the law requires the security to be to the corporation, and it must be by its corporate name.

Plea good. Though counsel may appoint for a year definitely if they please—that will be an appointment during pleasure—and the plea avers the office was terminated.

Oswald v. Mayor of Berwick, and the latter case is altogether in defendants' favour.

Mayor of Cambridge v. Dennis, 27 L. J. Q. B. 474.

Barlow, the treasurer, at the end of 1853 owed £193; subsequently he paid up, so that he only owed £70 or £80. Afterwards he again increased his debt. Defendants may take advantage of his payments, but cannot be liable for increase by subsequent liabilities; the bond only extends to the year 1853.

DRAPER, C. J.—The defendants have not denied the bond declared upon. At the date of that bond, 28th of February 1853, by the 2nd section of 12 V. c. 81, all the corporate powers possessed by the plaintiffs were to be exercised by, through, and in the name of the Municipality of the Township of Beverley. Their present corporate name is given by 22 V., ch. 54, sec. 99; Con. Stat. U. C., ch. 54, sec. 4.

The question would have assumed a different shape if *non est factum* had been pleaded, and we must have determined whether the bond would not be valid, notwithstanding the error of the name, in accordance with the principles of many old cases which are collected in the Com. Dig. title Capacity B5, Bacon Abr., Corporation C.

But by pleading over it was admitted that the defendants made this bond to the plaintiffs by the name of the Beverley Municipal Council, and I think they cannot return to this objection on a demurrer to their plea, even if it were available, which at present I am not prepared to decide. It is on the record, and if it be error they are not prevented from taking advantage of it.

Then as to the plea, it asserts that the appointment of Barlow as treasurer "was an annual appointment;" that

his appointment as treasurer *terminated* at the end of the municipal year 1853, and that during the currency of that year he did account, &c., and did pay over, &c., all moneys, &c., due by him to plaintiffs during the currency of his appointment as treasurer for the year 1853, and according to *Kitson v. Julian* (4 E. & B. 854) the allegation in the plea that the appointment was for one year and no longer being admitted by the demurrer, it had the same effect as if the same period of appointment had been recited in the condition of the bond, and brought the case within the principle of *Lord Arlington v. Merricke*, in a note to which the cases down to 1845 are referred to—3 Wm. Saund. 415b, note h. That however was a case in which, apart from the record, the court could have no knowledge of the duration of the appointment, whether it was for one year or more. But by 12 Vic., ch. 81, sec. 171, it is made the duty of municipal councils of townships to appoint a treasurer, who shall hold office during their pleasure; and by section 173 of the same act the treasurer as well as other officers, with regard to whose period of service no other provision is made by the act, shall hold their offices until removed therefrom by the municipal council for the time being. The case then seems to me to fall within the decision of *Curling v. Chalklen*, 3 M. & S. 502, where a plea very similar was held to be bad for two reasons:—1st, that it should have been averred that it was an annual office at the time the bond was made; 2nd, that the appointment was under an act of parliament which, so far from limiting it to one year, provides expressly for its longer continuance. Here the words of the condition are general, extending over any period during which Barlow should hold office; the public statute law is in direct contradiction to the assertion in the plea that the appointment is annual, and there is no averment of any special appointment differing in terms from the provisions of the statute, nor anything in the condition qualifying the liability by any such special appointment, if there was one, which on the demurrer we have no notice of.

I think, therefore, this plea is bad. This determination renders it useless to consider the 1st and 3rd questions submitted by the special case.

As to the second question, which, strictly speaking, on this record, and after our judgment on the demurrer, arises, if at all, only as to the amount of damages, I cannot say I have entertained any serious doubt. Nothing can be more general than the language of the condition that Barlow shall make and give "a true and just account of all such sums of money, notes, chattels, and other things that have or may come into his hands or possession as treasurer aforesaid, and shall pay or deliver over to his successors in office, or any other persons duly authorised to receive the same, all such balance or sums of money, notes, chattels, and other things as shall be in his hands and due by himself to the said Beverley Municipal Council."

The objection is—1st. That by 16 Vic., ch. 184, the municipal councils were authorised to impose duties on pedlars and hawkers, and to require them to take out licenses; to require auctioneers, persons selling liquors by retail in places other than houses of public entertainment (as to which the councils had already the same power), and persons keeping billiard tables for hire or gain, to take out licenses, paying for them such sums as the councils should by by-law determine, which sums should be collected and received by such municipal officers as the councils should appoint to receive the same. That large sums would consequently come into the treasurer's hands, thereby increasing the risk of the defendants as his sureties, and altering the nature of his office by adding to the extent of his duties.

2nd. That under the 18 Vic., ch. 2, moneys arising from the sale of clergy reserves, remaining unexpended and unappropriated under the 2nd, 3rd, and 4th section of the act, are, by the 5th section, to be apportioned among the several "*county and city municipalities*" in proportion to their population, and the portion coming to each municipality shall be paid over by the Receiver-General to the treasurer, chamberlain, or other officer having the legal custody of the moneys of each municipality, and shall make part of the general funds of the municipality.

As to the first, I do not see how the question arises; for it nowhere appears that any by-laws imposing such duties

or licence fees have been passed, or that the treasurer has by any by-law been appointed to receive the same, without which either we must hold that by the conferring on township councils additional means and power to increase their revenue, although unexercised, the character of the office of treasurer is altered and the risk of the sureties increased, or we must overrule the objection. The latter, in my opinion, is the proper course.

Then as to the second, the township municipalities are not referred to in the 5th section of the above clergy reserve act. The act however is amended by 19 and 20 Vic., ch. 16, which directs the apportionment of the unexpended and unappropriated moneys to be made among the several cities, towns, incorporated villages, and township municipalities in Upper Canada, commencing with the balance on 31st of December 1855. Whether any such payments were made to Barlow during the terms for which it is sought to make these defendants responsible does not appear.

But on a more general ground, I am of opinion, and I believe my brothers fully concur with me, that the creation of additional sources of revenue can no more be treated as altering the nature of the office, or the duties of the treasurer, or the risk of the sureties, than the increase of rates and assessments levied upon subject-matters within the power and authority of the council at the time the sureties entered into their obligation could be held to have such an effect. I cannot conceive that such was the intention of the parties apart from the bond, and neither the bond or condition contain anything to lead to such a conclusion. There is no undertaking expressed or implied that the municipal revenues shall remain *in statu quo* as to their sources any more than there is as to their amount; the increase of the latter must certainly have in the very nature of things been expected. So long as the duties to be performed by the treasurer as to receiving and paying out *all* moneys of the municipality, so long I consider the liability of his sureties as to such receipts and payments is unaffected.

I think, therefore, the sureties are liable for any deficiency

arising on receipts from these two sources as well as from any other, which is not contested.

The plaintiffs are, in my opinion, entitled to the *postea*.

*Per cur.*—*Postea* to plaintiffs.

See Mayor of Cambridge v. Dennis, 5 Jur. N. S. 265; Barclay v. Municipal Council of Darlington, 11 U. C. Q. B. 470; Fisher v. Municipal Council of Vaughan, 10 U. C. Q. B. 492; Hawkins v. Municipal Council of Huron, &c., 2 U. C. C. P. 72; Farrell v. Mayor and Town Council of London, 12 U. C. Q. B. 343; Wilkes v. Clement, 9 U. C. Q. B. 339; Cole v. Green, 6 M. & Gr. 872; Judd v. Read, 6 U. C. C. P. 362; Webster v. Macklem, 4 U. C. C. P. 266; R. v. Justices of Leicester, 7 B. & C. 7; R. v. Birmingham, 8 B. & C. 29; Kitson v. Julian, 4 E. & B. 854; Mayor of Berwick v. Oswald, 3 E. & B. 653; Curling v. Chalklen, 3 M. & S. 502; Frank v. Edwards, 8 Exch. 214; Holland v. Lea, 9 Exch. 430.

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### CRAIG V. RANKIN ET AL.

*School-rates—Collection of—Trustees.*

A general school meeting having passed a resolution "That the expenses of the school section be paid by voluntary subscription, and the balance to be raised from a tax to be levied upon the parents and guardians of those *sending children* to the school." The school trustees, after the failure of the voluntary subscription, levied a general rate, upon which this replevin arose, the plaintiff contending that he was not liable as not being a guardian or parent of a child attending the school.

*Held* that the trustees had no authority to tax the parents or guardians of those sending children, or to alter or annul the resolution, and that the 10th sub-section of the act authorised the levy as made.

REPLEVIN by John Craig against Hugh Rankin, Reuben Spooner, Patrick Daly, and James Swift, for a cow, value £5.

*Pleas*—1st. That defendants did not take.

2. Cognizance by defendant Swift, that the other defendants were school trustees of school section number 14, in the township of Kingston, and that the plaintiff was liable to be rated for school purposes in said section; that a rate was imposed by said trustees, and plaintiff was thereby rated for

the sum of ——. That a list or warrant was delivered by said trustees to defendant Swift, who was collector of said school section, that defendant Swift demanded amount of rate from plaintiff, which he refused to pay, wherefore defendant Swift took said goods as a distress for said rate.

3rd. Avowry by the other defendants Rankin, Spooner, and Daly, as trustees of said school section, setting out same facts as in the cognizance of defendant Swift.

Replication.—1st. Joins issue on defendants' pleas. 2nd. As to cognizance of defendant Swift that plaintiff was not the occupier of property in school section No. 14, nor liable to be rated as in the cognizance mentioned.

3rd. As to cognizance of defendant Swift that before assessing said rate, to wit, on the 13th of June 1858, at the annual meeting of said school section it was decided that the expenses of said school section should be provided by a voluntary subscription; that a large amount, to wit, £50 was subscribed, which the trustees should have collected before imposing said rate, but that said trustees did not collect said subscription, but unlawfully, &c., made said rate and delivered said list and warrant to defendant Swift to collect same.

4th. As to avowry of defendants Rankin, Spooner, and Daly, same as to defendant Swift.

Rejoinder by defendant Swift.—1. Joins issue on plaintiff's plea to cognizance of the defendant Swift.

2nd. Joins issue on plaintiff's second plea to cognizance of defendant Swift.

3rd. Also, as to said second plea to defendant Swift's cognizance. That said resolution was in the following words—"Resolved that the expenses of the school section be paid by voluntary subscription, and the balance be raised from a tax to be levied upon the parents and guardians of those sending children to the school." That the only amount subscribed under said resolution was £2, 2s. 6d., and was wholly insufficient to defray the expenses of the school, and could not be collected, wherefore the amount provided by said resolution by any proceedings that could legally be taken thereunder being insufficient to defray expenses of

school, said rate was duly made and imposed to defray balance and amount due or to become due for expenses of the school section.

4th. Defendants Rankin, Spooner, and Daly join issue on plaintiff's plea to their avowry.

5th. Defendants Rankin and others, also as to said plea, rejoin same facts as defendant Swift.

Surrejoinder by plaintiff—1. Joins issue to replication to said plea to defendant Swift's cognizance.

2. As to the said replication, also says that he the plaintiff was not nor is a parent or guardian of a child or children sent to said school, and that the rate could not be legally imposed on him.

3. Joins issue on replication of defendant Rankin and others to plaintiff's second plea to avowry of Rankin and others.

4. As to said replication, same as to Swift's replication.

Demurrer by defendant Swift to surrejoinder on the following grounds—that the said surrejoinder admits the fact stated in the replication to which it professes to be an answer, but shews no sufficient answer thereto; that the rate required to pay the expenses of the school section could only be levied and collected of the freeholders and householders of the section, and that the plaintiff being a freeholder or householder of the section was liable to said rates, and that he was not exempt from such rate by reason of his not being the parent or guardian of a child or children sent to or attending the school of said section; that the mode of raising the balance of the expenses of the school section provided by the resolution set forth in said replication is unreasonable and illegal, and the trustees could not legally carry out the said resolution, and what was provided by said resolution was insufficient to defray the expenses of the school section, and the trustees were therefore justified in levying the amount by rate on all the freeholders and householders of the section.

Demurrer by defendants Rankin and others to surrejoinder on the same grounds as demurrer of defendant Swift.

*Richards*, Q. C., for defendants, referred to *McMillen v. Rankin*, 19 Q. B. U. C. 356.

No counsel appeared for plaintiff.

DRAPER, C. J.—A similar question in a suit brought by one *McMillen* against these same defendants, upon similar pleadings, was decided last term by the Court of Queen's Bench on demurrer in favour of the defendants.

I quite agree in that conclusion, and I have had more trouble in reading the pleadings in this demurrer book than in making up my mind upon the question raised.

The rejoinder is no answer to the replication. By section 27 of Consolidated Statutes U. C., sub-section 1 (division C), the secretary and treasurer is to receive and account for all school moneys collected by rate bill, subscription, or otherwise from the inhabitants of the school section; by sub-section 2 they may appoint a collector to collect the rates imposed by them on the inhabitants of their school section or the sums which the inhabitants have subscribed; and such collector shall, by virtue of a warrant signed by a majority of the trustees, have the same power in collecting the school rate or subscription, and shall proceed in the same manner as ordinary collectors of county and township rates and assessments. The 10th sub-section of the same section authorises the trustees to provide for the salaries of the teachers and all other expenses of the school, in such manner as may be desired by a majority of the freeholders and householders of the section at the annual or a special school meeting, and to employ all lawful means to collect the sums required for such salaries and expenses; and *if the sums thus provided be insufficient to defray* all the expenses of the school, the trustees may assess and cause to be collected an additional rate in order to pay the balance. The 125th section of the same act declares that all the school expenses of each section shall be provided for by all or any of the three following methods:—1st. Voluntary subscription. 2nd. Rate bill for each pupil attending the school. 3rd. Rate upon property. The replication to the plaintiff's second plea to the cognizance of one defendant, and the avowry of the other three, sets forth the only resolution passed at the

annual school meeting of the section in question in these words—"Resolved that the expenses of the school section be paid by voluntary subscription, and the balance be raised from a tax to be levied upon the *parents and guardians of those sending children to the school.*" It avers the total insufficiency of the voluntary subscription or otherwise under the said resolution for the required purposes, and that even that sum was not paid, and could not be collected, wherefore the rate and assessment in the cognizance and avowry respectively mentioned was duly made and imposed by the school trustees in order to pay the balance of the school expenses. The plaintiff rejoins that he was not the parent or guardian of a child sent to or attending the school, and that a tax could not lawfully be levied upon him for the balance of the said expenses, according to the terms of the said resolution. He thus admits this was the only resolution passed, and admits also the total failure of the voluntary subscription, and relies upon a matter which, whatever may have been intended, certainly is not expressed in the resolution. He treats the resolution as providing for the school expenses by two out of the three methods mentioned in the 125th section—namely, voluntary subscription, and rate bill imposed on each pupil attending the school, and sets up as an answer that he is not a parent or guardian of any child sent to the school, meaning thereby that the resolution of the annual meeting authorises a rate or tax upon such parents or guardians, and on no one else, to make up any deficiency in the voluntary subscription. But the resolution provides for a tax on the parents or guardians of those sending children, not of the children sent to the school; and the trustees had no authority by law to tax such parties or to amend this absurd resolution, and therefore they had to resort to the authority given in the 10th sub-section of section 27, already set out, in the event of the sums provided at the annual school meeting being insufficient. This is what they rely upon in the replication, and what the rejoinder attempts to but does not meet.

I think the defendants entitled to judgment on this demurrer.

Judgment accordingly.

## McCALLUM V. SNYDER ET AL.

*Lease—Rent—Payment of in advance.*

Under a lease dated 1st October 1857, *habendum* for five years from the date thereof, "yielding and paying therefor on every first day of October during the said term," it was proved that the first year's rent had been paid in advance.

*Held* that the rent was not payable in advance under the terms of the lease, and that the term included the whole of the 1st October 1862.

The declaration stated that plaintiff had been tenant to defendant Snyder of a messuage, &c., under a yearly rent of £47. That defendants wrongfully took and distrained in and upon the said premises goods and chattels of the plaintiff of the value of £200, to wit, &c., and on 23rd November 1858 sold the same as such distress for certain alleged rent, to wit, £47, then pretended to be due to Snyder whereas no rent was then due.

Second count for excessive distress.

Third count, selling a crop of wheat which had been distrained for rent claimed by Snyder before the same had been gathered and appraised.

Fourth count, for not selling at the best price.

Fifth count, trover.

Plea not guilty by statute, 11 Geo. 2, ch. 19, sec. 21.

The cause was tried at the last Toronto Spring Assizes before *Hagarty*, J. The case went to the jury upon the first count for levying when no rent was due, and they gave a verdict for the plaintiff, and double the value of the goods distrained, making their verdict four hundred pounds. The whole question was whether the rent was payable in advance. A lease was put in, dated 1st October 1857, whereby the defendant Snyder let to the plaintiff the front of the east half of No. 22, 7th concession of Vaughan. To hold for five years "from the date hereof, yielding and paying therefor yearly and every year on every first day of October during said term" the yearly sum of £47, and the plaintiff covenanted "to pay the said rent in manner aforesaid." It was proved that the plaintiff had paid the first year's rent in advance. One witness stated that in September 1857 the plaintiff told him he had to pay a year in advance, and

that he had paid one year, and had to pay 1st of every October. A witness called for plaintiff on the reply stated that both the parties came to him and gave him to understand the first year's rent had been paid in advance, and the defendant asked if he had a right to distrain for rent payable in advance. This was long before the sale. The plaintiff was willing to give security, but objected to have the things sold; defendant insisted on his rent. Both spoke of the first year's rent having been paid in advance, and the defendant claimed the second year's rent in advance. The witness had a claim on the plaintiff, and he stated his belief that plaintiff would have given a chattel mortgage for his claim and the defendant's, but it fell through from defendant insisting on his rent at once.

Leave was reserved for defendant to move to enter a non-suit or a verdict for him.

Instead, however, of this, the rule was moved and taken out for a new trial for misdirection on the construction of the lease, the learned judge having directed the jury that upon the lease no rent was due.

*E. C. Jones* shewed cause. He cited *Pugh v. Duke of Leeds*, Cowp. 714; *Ackland v. Lutley*, 9 A. & E. 879.

*McMichael*, in support of the rule, contended that the term commenced upon and included the 1st day of October, as the *tenendum* was "for the term of five years from the date hereof," and that the first day of October, being part of the term, and the rent being payable on every first day of October during the term, the second year's rent was payable on the 1st October 1858. The conduct of the plaintiff in paying the first year's rent was evidence of the meaning of the parties.

DRAPER, C. J.—Mr. *McMichael*'s argument founded on the fact that the term commenced on the 1st Oct. and on the rent being payable on each 1st day of Oct., during the term, considered apart from the fact that the first year's rent was actually paid in advance, is answered by a passage from Lord *Denman*'s judgment in *Ackland v. Lutley*, where it is said "the general understanding is, that terms for years last dur-

ing the whole anniversary of the day from which they are granted. Indeed, if this were otherwise, the last day on which rent is almost uniformly made payable would be posterior to the lease." We should be well warranted by the unquestioned authority of *Pugh v. The Duke of Leeds*, in holding that the term in this case commenced on 1st Oct. 1857, and that it will, according to the doctrine of *Lord Denman*, expire on 1st October 1862. Therefore it might well be that the rent should be payable on each 1st October, and yet that the payments would not fall due until the end of each year; for the legal intendment would in the absence of any express stipulation to the contrary be, that the rent reserved, being payable annually, it would not be payable until the end of the first year, and if this be the true and proper construction of the instrument, and the plain intention of the parties as expressed therein, we have only to consider whether anything is shewn which will warrant our placing a different construction on it. There is, first, the plaintiff's admission that he was to pay, and that he had paid, the first year's rent in advance. 2nd. The defendant insisting that he was entitled to have the second year's rent paid in like manner, and the plaintiff's willingness to give security for the second year's rent, while objecting to have the things sold. The latter statement is not entitled to much weight, for I cannot view the plaintiff's objecting to have his things sold, though he was willing to give security, as amounting to an acquiescence in the defendant's claim to prepayment; and even if it were, there would still remain the difficulty that unless the rent was payable in advance according to the terms of the lease, this indirect acquiescence would not make it so, or confer a power to distrain which was not the result of the contract on the lease. The admission that the plaintiff was bound to pay and had paid the first year's rent in advance, when the lease itself does not require it, would rather show an understanding between the parties as to this payment, than alter the construction of the instrument by parol evidence of agreement not expressly proved to have extended to the second and subsequent year's rent. We think therefore the rule should be discharged.

*Per cur.*—Rule discharged.

## HOWEE V. MILLS.

*Guarantee—Surety—Equitable plea—Time given to principal.*

Action by H. against M. on a guarantee of a mortgage made by one G., and assigned by M. to H.

*Plea* (on equitable grounds) that the mortgage was given by Grey as collateral security for two promissory notes of £100 each, made by Grey to one W., and endorsed by him; and that said notes were given to H. (plaintiff) with the mortgage, and that one note having become due, H., without notice of presentment and dishonour, and without defendant's consent, gave Grey time, for a valuable consideration; on demurrer.

*Held* good, and that the defendant as surety was thereby discharged.

The declaration stated that the defendant on 19th July 1856, in consideration of £200 paid to him by plaintiff, assigned to plaintiff a mortgage made by one Grey, to secure to defendant payment of £250 and interest, by certain instalments now all past due, and all moneys then due and to become due thereon; and the defendant, for the consideration aforesaid, agreed with the plaintiff to guarantee and secure to him payment of those moneys if payment could not be recovered from Grey.

*Averment.*—That the said moneys are all overdue and unpaid, and that the same cannot, nor can any part thereof, be recovered from Grey.

*Plea* on equitable grounds, that the mortgage was made by Grey to secure to defendant payment of three promissory notes made by Grey, payable to one Wilson or order, and by him endorsed to the defendant. That before the mortgage was assigned to plaintiff, one of the notes amounting to £50 had been paid, and such payment was endorsed on the mortgage, and the other two notes were not due at the time of the assignment. That the consideration for the assignment was £200, and the defendant, with the assignment, delivered to the plaintiff the two promissory notes mentioned therein, endorsed by Wilson, each amounting to £100, as mentioned in the said mortgage; that after the first note for £100 became due, the plaintiff, without giving notice of presentment and non-payment to Wilson, and without consent of the defendant, agreed with Grey, in consideration of his giving his note for \$28, to give him time for the payment of the first note of £100, and did give time for the payment thereof for a year. That on the 16th of June 1858

Grey, without defendant's knowledge or consent, placed certain promissory notes amounting to \$155·77, in the hands of the plaintiff, to be applied, when collected, in part payment of the two notes. That part of the lands upon which the mortgage was given were at the time of the assignment encumbered by a mortgage made by Grey to Nicholas Hart, who had assigned it to Jeremiah London, and on the 8th of November 1858, there was due thereon \$500. That plaintiff, on the 8th of November 1858, without knowledge and consent of defendant, agreed with Grey to purchase the lots mentioned in the mortgage, with the machinery, &c., belonging to a foundry thereon, for \$1600, and to pay London his claim of \$500, and to rent to Grey the foundry with a dwelling-house for two years. That plaintiff sued the two promissory notes in his own name and recovered judgment, and levied of the goods of Grey \$20, without the knowledge or consent of the defendant, and without such consent foreclosed the mortgage against Grey in his own name, and is now the absolute owner of the land as against Grey, but subject to the mortgage for \$500; that Grey purchased the lands covered by the mortgage of the said London for \$1600, and the other lands which the mortgage of the defendant covers, as well as those of London, for \$800, which last-mentioned lots were not encumbered when the mortgage was made to the defendant.

To this plea the plaintiff demurred, objecting that it did not allege that time was given to Grey to pay the mortgage money, but only the two notes which were not guaranteed by the defendant; that the plea shews the plaintiff did not give time on the mortgage, for he foreclosed it, but such foreclosure does not bar this action, as it is not alleged the debt was satisfied by the foreclosure; that the remainder of the allegations on the plea are immaterial.

The plaintiff also took issue on this plea, and the case was tried at Sandwich in April last before *Richards, J.* A verdict was given for defendant, with leave to plaintiff to move to enter a verdict for him, and for such amount as the court, under the evidence given, might think him entitled to recover. The court to be in place of the jury to draw inferences as to

facts, and to assess damages on the demurrer, if the plea was bad.

The defendant proved that the plaintiff did give time to the maker of the notes, Grey, when the first of them became due. In this particular the plea was substantially proved. There was no proof of notice of presentment and of non-payment to Wilson, the endorser of the note, but it was sworn that he had become insolvent and ran away before the making of the assignment to the plaintiff by the defendant. About a month before the second note fell due Grey placed in the plaintiff's hands notes against these parties to the amount of \$155.97, to be applied when collected in part payment of his own notes. There was also produced an unsigned memorandum of agreement that plaintiff would purchase the four lots—that is, the two mortgaged to defendant and the two mortgaged to London—and would pay London \$500 in one or two years, and that Grey was to rent the foundry and dwelling-house from plaintiff, but no proof was given that any such agreement was actually made in binding form, though it may have been talked over. It did not appear by whom the memorandum was prepared. There was some evidence that the plaintiff had recovered judgment on the two notes for £100 each, and had realized \$20 on execution. But it was not proved that the plaintiff had foreclosed the mortgage assigned to him; the only foreclosure appeared to be by London, of the mortgage he held.

In Easter Term *Prince* obtained a rule *nisi* on the leave reserved, on the ground—1st. That the plea was no answer to the action. 2nd. That it was not proved. He also supported the demurrer.

*Crombie* argued for the defendant.

DRAPER, C. J.—The first thing to be done is to get rid of so much of the plea as is wholly unimportant, having no tendency to sustain a defence. and establish an answer to the plaintiff's demand. There are several statements which, as leading to and connected with something else, might have shewn a ground of defence, but which, as they appear now, really amount to nothing. The only proposition in the plea

that will bear argument is, that under the circumstances the defendant became a surety to the plaintiff for the payment of the money secured by the mortgage assigned, and by the two promissory-notes, each for £100; that the plaintiff gave time to Grey without the consent of the surety to pay the first of these notes, accepting a consideration for such giving of time, and consequently that defendant as a surety is discharged.

Thus the averment that Grey deposited notes to the amount of \$155·97 with the plaintiff really has no connection with such a defence, and by itself it clearly furnished no answer to the declaration.

So the statement that there was an agreement on the plaintiff's part to buy the lots included in this and the other mortgage, or rather Grey's equity of redemption in them, is wholly unconnected with the discharge of the defendant as a surety, by giving time to Grey as his principal, nor is it so stated or connected with other facts as to afford a defence to the action. The same may be said of the recovery of judgment on the notes, which has produced only a satisfaction of \$20. It falls short of being an answer to the plaintiff's claims taken *per se*, and is connected with nothing else that shews a satisfaction. And so it is, I think, with regard to the alleged foreclosure; it is an introductory step to a good defence, but nothing follows which would have made it effectual.

So that the plea is reduced to two questions. Does it aver enough to put the defendant in the situation of a surety entitled to the rights which attach to that character, and if so, has the plaintiff done that which in equity will be a complete bar to his recovery?

Regarding what I conceive to be the substance of the plea, it may be thus stated—Grey owes a debt of £200 to the defendant; it is evidenced by, and the time for its payment is set out in, two promissory-notes, each for £100, endorsed by a third party, and it is secured by a mortgage on real estate. The plea omits to give any further particulars—when the notes were made, at what day payable, whether they and the mortgage are of the same date, in what manner

they are referred to in the mortgage, so as to connect anything done with respect to the one with the other of these promissory-notes.

The great difficulty I have felt in dealing with this plea is its want of precise statement in these particulars, and for this want I doubted whether the plea could be upheld. It is further averred that the defendant assigned this debt (that is the substance of the averment) to the plaintiff for a full consideration, and that he also guaranteed and undertook for its payment. He thus became surety to the plaintiff that Grey should pay the £200 at the stipulated periods. It is then shewn that when the first payment became due the plaintiff for a consideration moving from Grey to himself gave further time for payment without the knowledge and consent of the defendant. That time was given to the principal without any reference to the surety. This is the point of the defence.

The statement that the plaintiff obtained judgment on the notes and foreclosed the mortgage in his own name, both which stand admitted for the purpose of the demurrer, seem to me to have no bearing on it. They were probably introduced with some view of shewing that the plaintiff by thus dealing with and altering the character of the securities he held had altered or prejudiced the defendant's position in respect thereto. I do not see that this affords any grounds of complaint or defence. The securities must have been assigned to him that he might enforce them and realise the debt. If nothing more than that appeared I should still think the defendant liable, though he would have a right on paying plaintiff to have an account and the benefit of the judgment and foreclosure.

It is on the ground of time given to the principal without the knowledge or assent of the surety that I have brought myself to the conclusion the plea may be upheld. My brothers entertained this opinion clearly when I felt pressed to an opposite view, but on reflection I am satisfied to concur with their view as the sound one.

Then the evidence certainly proved so much of the plea as is involved in this determination, namely, that time was

given, and moreover for a valuable consideration, as the plea states.

We think, therefore, the defendant should have judgment on the demurrer, and that the rule *nisi* obtained by the plaintiff should be discharged.

Rule discharged, and judgment for defendant on demurrer.

### NEALE ET UX. V. WINTER.

#### *Ejectment—Mesne profits—Costs.*

The plaintiffs having recovered in an action of ejectment against one Withrow, the possession of certain land occupied by Withrow as tenant to defendant, they bring an action against defendant for mesne profits, and succeed; the costs of the ejectment suit being allowed as part of the damages on the action for mesne profits. These costs were subsequently reduced on revision by the master in Toronto, by the sum of £120, 15s. 2d., and this motion was made to reduce the verdict by that amount.

*Held* that the amount taxed on the revision in Toronto was the amount plaintiffs were entitled to, and the verdict was reduced accordingly.

*R. A. Harrison* obtained a rule *nisi* that the endorsement on the writ of *fi. fa.* in this cause should be reduced by the sum of £120, 15s. 2d., being the amount struck off the plaintiff's bill of costs in an action brought by the plaintiffs against John Withrow and Samuel Withrow, which bill of costs was part of the subject-matter in dispute in this action, on revision thereof by the master, and that the plaintiff should pay the costs of the application in this cause in Chambers, and of this application.

The rule was granted upon affidavits, which are very lengthy, and go into numerous details. They are also contradictory. The first application for the relief which the defendant by this rule seeks to obtain was made to a judge in Chambers, who heard the parties, and before whom an affidavit of the plaintiffs' attorney in reply to the application was made. The proceedings on the *fi. fa.* were stayed until this term that this application might be made. The defendant has filed new affidavits, mainly for the purpose of meeting some of the allegations in the affidavit of the plaintiffs' attorney, and this rule was granted upon such new affidavits, and upon those used on the application for the summons.

It is unnecessary to enter into the particulars of those affidavits. All that need be considered for the purposes of this application seems to me to be included in the following statement:—

The plaintiffs recovered judgment in an action of ejectment against John Withrow and Samuel Withrow about July 1859, and asserting that these parties were tenants of the now defendant they brought their action for *mesne* profits against him, and they recovered, and at the trial the jury were directed to sever the damages under three different heads—1st. The costs taxed in the ejectment suit, and endorsed upon the writ of *hab. fac. pos.*, and which had been taxed at the office of the deputy-clerk of the Crown at Woodstock. 2nd. The profits or value of the land, while occupied by the Withrows, down to the commencement of the action of ejectment. 3rd. The profits from the commencement of the action of ejectment down to the execution of the *hab. fac. pos.* The jury did so, and under the first head they found the damages in this cause were £224, 2s. 6d. On or about the 10th of January 1860 judgment was entered in this cause for £257, 19s. 9d. damages, and £36, 13s. 6d. costs. This judgment was entered at an outer office, and a revision of these costs took place before the master at Toronto on the 30th of February 1860, who struck off £9. A *fi. fa.* against the defendant's goods had been put into the hands of the sheriff of Brant on the 12th of January 1860, endorsed to levy £257, 19s. 9d. damages, £36, 13s. 6d. costs and interest, 25s. for the writ, and 25s. for certificate of judgment. After obtaining the revision of the taxation of the bill of costs in this cause, the defendant brought the bill of costs in the ejectment suit before the master at Toronto, on the 5th of February 1860, and he struck off a sum of £120, 15s. 2d., which from the affidavits, it would seem, were costs incurred in England in relation to obtaining evidence in support of the plaintiffs' claim in the ejectment, or in the execution of a commission sent for that purpose. The affidavits contain no exact information on this point, nor why the master made that reduction. The plaintiffs' employed the same attorney in both actions.

The question was, whether this court could and ought to order the reduction in the endorsement prayed for by this rule?

*Anderson* shewed cause. He cited *Doe v. Filliter*, 13 M. & W. 47; *Cannan v. Reynolds*, 5 E. & B. 301.

*Harrison*, contra, cited *Hopwood v. Adams*, Burr 2660; *Oppenheim v. Harrison*, Burr 20; *Johnson v. Birley*, 5 B. & A. 540, and 543, *n*.

DRAPER, C. J.—The jury have not been called upon to exercise any judgment of their own in order to ascertain this portion of their verdict. They have simply adopted the amount of costs endorsed on the writ of *habere facias possessionem* as the amount to which the plaintiffs were entitled, and no doubt that was the amount of the costs taxed in the action. Possibly that taxation was *ex parte*. The defendant swears he knew nothing of it.

The taxed costs in the ejectment are all that the plaintiffs were entitled to recover as an indemnity for the expenses they were put to in recovering possession of their land, and it was on the assumption that such costs were correctly taxed that they were allowed to the plaintiffs as part of their verdict. It will not be questioned, I suppose, that if the revision had taken place before the trial the plaintiffs could only have recovered the reduced amount. We have now the same ground for knowing that those costs in reality are £120, 15s. 2d. less than the sum recovered by the verdict, as the jury had for their conclusion with this difference, that we possess the decision of the officer to whom the law permits an appeal from the taxation by the deputy clerk of the Crown. And this proceeding cannot be said to have been taken *ex parte*, for the plaintiffs' attorney attended at least once, and the taxation was enlarged once or twice to suit his convenience. This is a more favourable case for granting relief than *Cannan v. Reynolds*, for the application, though after judgment, is before execution executed. We are not under the necessity, in order to do justice, to go as far as the court went in that case.

I confess that when this case was moved I doubted greatly of our jurisdiction, but on reflection I think we have the power, *adhuc sub judice lis est*, and from all that appears we are doing what is plainly just.

I think the rule should be made absolute.

I am surprised to find 25s. for certificate of judgment endorsed upon the writ. It is certainly unauthorised, and I supposed that had been fully understood, for it is a matter on which the opinions of different judges have, I believe, been repeatedly expressed.

*Per cur.*—Rule absolute.

## REED ET UX. V. RANKS.

### *Abstract—Patent—Title.*

*Held* that the production of an abstract of the registries upon a lot, shewing the granting by the Crown of a patent, is not sufficient evidence of title to maintain an action of dower without the production of an exemplification of the patent. (*Quære.*)—Is an abstract receivable in evidence at all if objected to?

The declaration claimed dower for the plaintiff Elsey as widow of Jehiel Tuttle, deceased, of lands in the township of Blenheim, of the endowment of Jehiel Tuttle heretofore her husband, whereof she hath nothing, and whereof demand was made on the 13th of June 1859.

*Pleas*—1. *Ne unques seizie que dower.* 2nd. That Jehiel Tuttle was an alien not born within the ligeance, &c., nor had he become, nor was he, a natural born or naturalised subject of the sovereign of Great Britain and Ireland, but was born and continued a subject of a foreign state, and that he was not at any time, after the act 12 Vic. ch. 197, had come into force, seised, &c.

The case was tried in April last at Woodstock before *McLean*, J. A notice of demand of dower by Elsey Reed, in the northern half of No 7, 11th concession, Blenheim, and one-third of the rents and profits from the 1st of June 1851, was served on the defendant on the 30th of June 1859. Defendant then stated that he owned the land.

An abstract of title as appearing on the books in the registry office was produced. According to this, W. Kennedy

Smith conveyed the whole lot to Joseph Thomas on the 4th of October 1825, and a series of conveyances from Smith down to the defendant were set forth. A deed was also put in, the execution of which was admitted, dated the 4th of June 1839, from Barnabas Patterson to Jehiel Tuttle, for the land mentioned in the declaration. Consideration £50. *Habendum* in fee, registered the 5th of June 1839. Joseph Thomas, to whom W. Kennedy Smith conveyed, swore that about 1831 he conveyed the same land to Barnabas Patterson, but did not know whether Patterson ever went into possession. And though he knew Tuttle from a child he never saw him in possession; he knew Jehiel Tuttle's father and mother, and it was his impression he (Tuttle) was born in Canada. Then the original memorial of the deed from Thomas to Patterson was produced, shewing that the deed was dated the 7th of November 1831, and by it was conveyed one hundred acres, being the northern half of lot No. 7, 11th concession Blenheim, though it seemed to have been misdescribed. *Habendum* in fee. The memorial was executed by Barnabas Patterson, and was registered on the 15th of February 1852. For the defence it was objected that there was no evidence of any grant from the Crown, nor that William Kennedy Smith had any title, and that the notice of demand of dower was not sufficient, being signed by Elsey Reed only, her present husband being no party to it. Elsey Reed was called for the defence. She stated that her late husband Jehiel Tuttle died 16 years ago in the United States, where he had lived about four years before his death. He had lived previously all his life in Canada, and was born in Ancaster, as she thought. He had possession of the land, but never improved it or fenced it, as she thought. It was admitted that both plaintiffs joined in instructing this action to be brought. The notice of demand of dower was signed by the plaintiffs' attorney. It was consented on the part of the plaintiffs that the defendant might move the court on the objections taken by him, and the plaintiff had a verdict.

In Easter Term *Beard* obtained a rule *nisi* on the leave

reserved, objecting that there was no evidence of the seisin of Jehiel Tuttle.

*J. Duggan*, Q. C., shewed cause. He said he was prepared to go further with the proof of the right of the demandant Elsey Reed, but the learned judge at the trial told him he had gone far enough. He cited *Lynch v. O'Hara*, 6 U. C. C. P. 259.

*Beard*, contra, cited *Prince v. McLean*, 17 U. C. Q. B. 463; *Wannacott v. Fillater*, 11 U. C. Q. B. 51.

DRAPER, C. J.—The only objection taken at the trial was, that there was no evidence of any grant from the Crown, nor that William Kennedy Smith had any title. The objection is put into a different form in the rule *nisi*, but it is substantially the same objection, for the motion is to enter a verdict for the defendant on the leave reserved, which leave was reserved upon the objections taken at the trial.

The objection that no grant from the Crown was proved was well founded, for the only evidence was, that on the abstract produced from the county registrar's office it was stated at the beginning that the Crown had granted the lot, naming the grantee. This is a weaker case than that of *Prince v. McLean*, cited by Mr. *Beard*, and we have no doubt that as evidence of the Crown grant it was wholly insufficient.

In fact, the abstract of title from the registrar's office, although proved to be correct as an abstract of what any person making a search at the registry office would find upon the books, was not evidence at all, strictly speaking, of the title, or of any of the conveyances mentioned in it. And we referred to the learned judge who tried the cause to ascertain what passed with respect to its reception. And we are informed that no objection was made to its admissibility of evidence, but the objection taken was that it was insufficient to prove that the Crown had granted the land, and consequently that it did not prove any title in Wm. K. Smith, the first party who is mentioned as having conveyed it. But if this abstract was admitted in evidence, with respect to the other parties and conveyances therein named, by

both parties at the trial, we may also look at it to see if what it contains sufficiently discloses the defendant's liability. Now it appears that the defendant is on this abstract stated to be the grantee of this very land by conveyance from a party to whom, as this abstract also shews, Jehiel Tuttle had conveyed it. So that [always assuming the abstract to have been properly received as evidence] the defendant derives title to this land from Jehiel Tuttle, whose seisin his plea denies, and as he told the person who served him with the demand of dower, he claims to be owner of the land; this we are of opinion was sufficient evidence to go to the jury in support of the demandant's case on that issue. In the argument before us the defendant's case was not rested on the ground that this abstract should have been wholly rejected; so that, coupled with what took place at the trial, we feel warranted in saying that we ought not now to refuse effect to it, though of opinion that if opposed it ought to have been rejected.

We think, under the peculiar circumstances, we ought not to make the rule absolute, either for a nonsuit or to enter a verdict for the defendant. If anything had been suggested to shew that on a full disclosure of the title the demandant would not be entitled to recover, we should probably grant a new trial, but when we see no reason to doubt that by procuring an exemplification of a patent from the Crown the title of William K. Smith would be conclusively established, and so the seisin of Jehiel Tuttle put beyond dispute, we think we are not called upon to take that course, for it would be prolonging the litigation for no useful purpose. Probably the defence relied upon was the supposed alienage of Tuttle; but there was quite proof enough that he was a British subject, and nothing whatever to support that plea.

We think the rule should be discharged.

*Per cur.*—Rule discharged.

## BUEL V. FORD.

*User—Prescriptive right—Plea of omitting word "next."*

The first count of the declaration claimed the right to the flow of the stream (being possessed of a grist mill thereon) for the working of the mill. That defendant by erecting a dam diverted the water of the said stream, whereby the plaintiff was prevented, &c. There were four other counts not material to this decision. Plea 2—That defendant as owner and occupier of the mill and land thereafter mentioned at the time of committing the grievance, &c., was possessed of land and a mill on the stream in the first count mentioned above the plaintiff's mill for upwards of twenty years before the commencement of the suit, and was entitled to and exercised during all that time the right to erect and keep dams, &c.

*Held bad, for omitting the words "next" and "as of right."*

DECLARATION.—1st count, that plaintiff was possessed of a grist mill, and by reason thereof was entitled to the flow of the water of a stream to the mill, for the working of the same; that defendant, by a dam, &c., placed across the stream above the plaintiff's mill, unlawfully diverted the water of the said stream, which of right ought to have flowed to the said mill, whereby plaintiff was prevented, &c.

2nd count, that plaintiff was possessed of another grist mill, and by reason thereof was entitled to the flow of the water of a stream to the same for the working thereof; that defendant, by wrongfully placing and erecting a dam across the stream above plaintiff's mill, wrongfully diverted the water which of right ought to have flowed to the mill, whereby, &c.

3rd count, that plaintiff was possessed of another grist mill, and by reason thereof was entitled to the flow of the water of a stream in its usual and proper flow to the mill for working the same; that defendant, by a dam, &c., placed across the stream above the plaintiff's mill, wrongfully penned back the water of the stream, and prevented the same, which of right ought to have flowed in its usual and proper flow and current to plaintiff's mill, from so doing, and plaintiff, for want of such water, could not use his mill, &c.

4th count, that plaintiff was possessed of another grist mill, and by reason thereof was entitled to the flow, of the water of a stream in its usual and proper course, flow and current, for working the same, and defendant, by wrongfully erecting a dam across the stream above the plaintiff's mill,

wrongfully penned back the stream, which of right ought to have flowed in its usual and proper course, &c., to the said mill, and plaintiff, for want of such water, could not use his mill, &c.

5th count, that plaintiff was possessed of the west  $\frac{1}{2}$  of No. 11, 2nd concession of Elizabethtown, and of a grist-mill and saw-mill thereon, and by reason thereof was entitled to the flow of the water of a stream to the said close and mills for working the same; that defendant, by a dam, &c., as in the first count, to the end.

6th count commenced like the fifth, down to the statement of plaintiff's right to the water for working the mills, and stated the wrong and injury as in the second count.

7th count commenced like the 5th and 6th, and states the wrong and injury as in the third count.

8th count commenced like the 5th, 6th, and 7th counts, and stated the wrong and injury as in the fourth count.

*Pleas*—1st, not guilty.

2nd plea to the first count that defendant and the owner and occupier of the mill and land thereafter mentioned, through whom defendant claimed, at the time of committing the grievances in the first count mentioned, were possessed of land and a mill on the stream in the first count mentioned above the plaintiff's mill in that count mentioned, for upwards of twenty years before the commencement of the suit, and were entitled to and exercised during all that time the right to erect and keep dams on defendant's land across the stream in the first count mentioned, and thereby to pen back the water for the use of the defendant's mill, and of the mills of the owners and occupiers through whom the defendant claimed, and during the construction and repairs of such dams and mills, and in accordance with such right, defendant and the owner, &c., did erect and keep dams on his land across the said stream, and thereby penned back the water for the purposes aforesaid, and during the construction and repairs, &c., and thereby necessarily diverted a portion of the water of the said stream, doing no unnecessary damage to plaintiff, as he lawfully might, *quæ sunt*, &c.

3rd plea to the second count the same as the second plea.

4th plea to the third count the same as the second plea.

5th plea to the fourth count      do.      do.

6th plea to the fifth count      do.      do.

7th plea to the sixth count      do.      do.

8th plea to the seventh count      do.      do.

9th plea to the eighth count      do.      do.

Replication to 1st plea joined issue.

To second plea demurrer, because the plea did not allege a user by defendant, and those through whom he claimed, of the prescriptive right set up in said plea, for a period of twenty years *next* before the commencement of the suit, but merely alleged such user for twenty years before the commencement of the suit, which might mean twenty years, however remote.

To the third and each of the subsequent pleas a demurrer for the same cause.

Joinder in demurrer.

Attached to the demurrer book was a notice of five other objections intended to be urged to the second and subsequent pleas, when and how delivered, or if delivered to the defendant's attorney, not being shewn, though it purported to be signed by the plaintiff's attorney, and was addressed to the defendant's attorney.

*Senkler* in support of the demurrer. Plea omits "*next*," and so does not follow ch. 88, sec. 39, Consolidated Statutes; *Haley v. Ennis*, 10 U. C. Q. B. 404.

Plea does not state the enjoyment was "*as of right*." Same statute, sec. 40; *Doe Stewart v. Yager*, 5 Q. B. 584.

Plea does not show a continuous enjoyment and without interruption, which is necessary, since they do not follow the words of the statute "*as of right*," but undertake without those words to bring themselves within the spirit of the enactment.

The plea sets up a right of a nature which cannot be acquired by prescription. This plea amounts to a claim to raise the water from time to time to any extent. Such a right is uncertain. *McKechnie v. McKeyes*, 9 U. C. Q. B. 563; *Hunt v. Hespeler*, 6 U. C. C. P. 269; *Bealey v. Shaw*, 6 East. 209.

Either the plea means this or it means nothing, for it asserts no specific right—it is not in terms pleaded as a defence for erecting the dam complained of.

He claims a right to keep up water for his *mills*, present, past, and future, whether larger or more numerous, which shews he does set up a prescription of a certain character—an actual enjoyment for twenty years of a specific easement.—*Buell v. Read*, 5 U. C. Q. B., 546.

*Cameron*, Q. C., *contra*.—If the pleas are bad, the declaration must be equally so for the same reason, claiming the use of the water for a grist mill “by reason of the possession of the mill” (no objection taken to declaration). Plea is independent of the prescription act. Plea is that defendant and the owners and occupiers had the right, and for twenty years enjoyed as owners the right, to use the water. The general allegation is preserved by the 40th sec. just cited. “As of right” is confined to the *occupier*; defendant claims as for the *owners*. *Haley v. Ennis*, 10 U. C. 404, is opposed to *Jones v. Price*, 3 Bing. N. C. 52. *Richards v. Fry*, 3 N. & P. 67, not reported on this point in 7 A. & E. 698.

The words “without interruption” are unnecessary in pleading the right, as it is matter of evidence, for if he fails to prove enjoyment without interruption, he fails to sustain his plea.

Then “as of right,” in *Doe v. Yager*, 5 Q. B. 584, there was nothing equivalent to “as of right.” This plea affirms a right absolutely, and unless the very words “as of right” are necessary, the plea is as strong in expression as can be as to possessing and enjoying the right, and the putting up the grievance complained of is said to be done by owners and occupiers in *accordance* with such right. The Consolidated Statute, ch. 88, sub-secs. 39, 40, was also referred to.

DRAPER, C. J.—If the question whether the plea should state the enjoyment of the right prescribed for to have been for twenty years *next* before the commencement of this suit, were now brought up for the first in this province, we might probably have thought it better to follow the decision in

Jones v. Price, and perhaps if that case had been referred to in Haley v. Ennis it might have influenced the Court of Queen's Bench in this province, and they might have followed it as an authority. But on this, a mere point of pleading, I think it better to follow the last case, which has in its favour that it requires the words of the statute to be followed in pleading a right to an easement over the land of another. On this ground, therefore, I think the plaintiff should have judgment on this demurrer.

I have more doubt as to the omission of the words "as of right" in the plea. It was argued that the plea is independent of the prescription act, asserting that the defendant and the *owners* and occupiers of the land exercised and enjoyed the right to erect and keep dams across the stream, and thereby to pen back the water for the period of upwards of twenty years before, &c., and that the owners and occupiers and the defendant in accordance with such right did, &c., and that defendant and the owners and occupiers under whom he claims having been, as is stated, in possession of the land on which the dam is erected (the cause of the injuries of which the plaintiff complains), the defendant may well allege that he is entitled to the right claimed by him as an appurtenance of the lands in respect of which he claims it. By giving evidence of an adverse enjoyment for twenty years next before the action was brought, he would establish his right presumptively at least, and until it was answered by the plaintiff sufficiently to entitle him to a verdict. I understand the right to be claimed by the plea as appurtenant to the land, and that the defendant and the owners and occupiers, under whom he claims, of that land are alleged to have been *possessed* of the land, and to have so exercised the right. Possession affords *prima facie* evidence of ownership. Still the case of Holford v. Hankinson, 5 Q. B. 584, affords countenance and support to the objection, and if in order to determine the demurrer that objection must be disposed of, I should require further consideration before I could say I was satisfied it ought not to prevail.

As to amending, leave should, I think, be granted to the defendant to amend the special plea, but only one special

plea should be pleaded to the whole declaration, as not guilty is pleaded. I see no necessity whatever for eight counts in the declaration; and if the defendant had applied, as I think he ought, to have struck out such as were superfluous, he would probably have succeeded in having half, and perhaps more, struck out. It was equally useless to repeat the same special plea to each count. It would be more to the honour of the profession, and of the character of proceedings in civil suits, if the expressed intentions of the legislature, to which the courts have endeavoured to give their ready and bounden aid, for the diminution of expense and the shortening of pleadings, were attended to in matters of this description.

Judgment for plaintiff.

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#### WILKINSON ET UX. V. CONKLIN.

*Will—Registry of deed by heir-at-law prior to—Valuable consideration.*

*Held* that the acceptance of a deed of land from the reversioner in fee did not of itself acknowledge any present right or interest in such reversioner, and that a conveyance by an heir-at-law for a nominal consideration, registered prior to a will, did not operate to cut out the will, a valuable consideration being required by the registry laws to take effect.

EJECTMENT for the undivided half of lot No. 4, 1st concession Gosfield, except that part known as the Gosfield mill property, in the possession of James Flood and John Nutson.

Defence general.

Writ issued the 20th of March 1860.

The case was tried at the spring assizes at Sandwich, before *Richards, J.* The plaintiffs proved that Peter Malott, the father of the plaintiff Mary Wilkinson, died in 1815, having made his will, dated the 3rd of December 1815. He was at the time of his death, and for several years before had been, in possession of the premises and other adjoining lands, and he devised to his "two daughters, Mary and Anne, lot No. 3, in the front concession of the said township of Gosfield, to be equally divided between them." In 1817 the two plaintiffs intermarried. There was a verbal agreement that Mary should have the

east half of No. 3, and Anne the west half, but Mary purchased Anne's right, and Wilkinson entered into possession of the whole directly after the marriage, and they remained in possession until 1844. On the defence there was a doubt thrown on the plaintiffs' proof of their entry into possession before 1820. It was stated that a company had been formed, called the Gosfield Mill Company, of which the plaintiff James was a partner, and Joseph Malott, the eldest son of Peter, who died in 1815, and Peter, a brother of Joseph's, were also partners, with others. This company became indebted to the Messrs. Park in about \$2200. The plaintiff James had given twenty-one acres (apparently the portion excepted in the declaration) as his contribution to the funds of the company, and the mill was erected thereon, and when the company broke up the plaintiff James assumed to pay the Messrs. Park \$850 as his portion of the debt, and it was sworn that he had at some time or other, between January and March 1840, declared that the Messrs. Park would not take a mortgage—that there was a deed; the farms were to be occupied by the parties, and if they paid up, he (one of the Parks) could not dispossess them; that he was going to work himself clear and get his place back again; that he was to pay this or lose his farm; that Park would be sure to give him a deed back if he paid him, and Park would not press him for a little time, and that was better than to give a mortgage. A witness named Hawkins swore that on the 27th of January 1840 Park had this claim against the Steam Mill Company; that the parties met and apportioned the claim among themselves, and gave a deed to Park to secure the payments; that Park agreed to leave them in possession at a nominal rent, with the understanding that they could redeem the land on payment in produce. He thought the plaintiff James Wilkinson was present at this meeting. No deed from the plaintiffs to Park was produced; but the defendants put in a deed-poll dated the 19th of April 1845, from Joseph Malott, whereby, in consideration of 5s., he remised, released, relinquished, and for ever quitted claim to Thomas Park, Theodore Park, and John

Park, their heirs and assigns, all those certain parcels of land in Gosfield, comprising parts of lots No. 3 and 4, in the front concession (describing it), "together with all and singular the hereditaments," *habendum* to the Parks, their heirs and assigns for ever. This deed was registered on the 3rd July 1856. The defendants also proved and put in a deed-poll, dated the 25th November 1846, made by the two plaintiffs and Peter Wilkinson (their eldest son, as appeared by other testimony), whereby, in consideration of £1 paid by Michael Fox, they remised, released, and for ever quitted claim to Fox, his heirs and assigns for ever, all the estate, right, title, interest, use, trust, property, claim, and demand of them, the said, &c., to lot number three and the east part of number four (describing it) in the first concession, western division, Gosfield, *habendum* to Fox, his heirs and assigns for ever. The plaintiff Mary did not go before any authority to acknowledge her execution of this deed according to the statute. The defendants further proved that the land had been conveyed in fee in September 1800 to Peter Malott, under whom all parties claimed, which conveyance was registered in April 1807, and they contended that the release from Joseph Malott, the heir-at-law of Peter, to the Messrs. Park, having been registered before the will, under which the plaintiffs claimed, the devise was by force of the registry act made fraudulent and void. The plaintiffs denied this on two grounds—1st, that no estate passed by the instrument, it being a mere release of the land; and 2nd, that not being for valuable consideration, the registry laws did not affect the devise, and they put in a deed-poll from Joseph Malott to themselves, whereby, in consideration of 5s., he remised, released, and for ever quitted claim to them, their heirs and assigns for ever, all his right, title, interest, claim, and demand to this same lot No. 3. This deed had no date, but according to the evidence it had not been executed more than five or six years before the trial.

The learned judge directed a verdict for the plaintiffs.

In Easter Term *A. Prince* obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection, on the

grounds that the title of the plaintiff Mary, by the devise, was defeated by the deed-poll from the heir-at-law, which was registered. That as to any title by possession, it would be a title enuring to the plaintiff James, and passed by the deed-poll to Fox, and that James Wilkinson is estopped by his declaration that he had sold the land and held as tenant to Park; that the defendants made out a title by twenty years' possession; and that the plaintiffs cannot dispute the heir-at-law's title, having accepted a deed from him. *Spafford v. Breakenridge*, 1 C. P. U. C. 492; *Doe Boulton v. Walker*, 8 U. C. Q. B. 571.

*O'Connor* shewed cause.

DRAPER, C. J.—As to the last objection, the heir-at-law is entitled to the reversion in fee, and the release might operate upon that. The plaintiffs, by accepting that, were not acknowledging that he had any present right or interest.

There was no evidence that the defendants, or those under whom they claim, had been in possession for 20 years. The evidence is clearly contrary. The declaration of Wilkinson that he had conveyed to Park was rather proved by the opinion and inference of a witness than from any direct assertion or admission of the fact, and no attempt was made to shew the existence of any such conveyance. His admission as to paying a nominal rent is, I think, too vague to amount to anything as a defence to the title he has proved. It is not as if he had got into possession under the Parks, and was insisting on holding against them.

The conveyance by the heir-at-law cannot, I think, have any effect to defeat the title of the plaintiff Mary, upon the ground that it was not for valuable consideration, and therefore not within the provision of the registry act.

I think the rule should be discharged.

*Per cur.*—Rule discharged.

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NICHOLAS WESSELS, OWEN WESSELS, JOHN WESSELS, AND  
ESROM WESSELS V. JOHN T. CARSCALLEN AND STEPHEN  
CRANDELL.

*Ejectment.*

A testator, "J.C.," by will "authorised and empowered" his executors, or a majority of them (naming five), to sell and convey certain lands, the lot in dispute, among others, and to apply the proceeds to a specific purpose, and left all the rest and residue of his estate to his wife E. C., to be disposed of by her as she should see fit.

E. C. subsequently sold to one J. W. the land in question for a valuable consideration, which consideration was applied according to the terms of the will. The plaintiffs claimed title through the will of J. W.

The other four executors of J. C. refused to act, except on one occasion, when it was proved that being sued they joined in a deed of conveyance (not of the lot in dispute in this action); it was further proved that John T. Carscallen, one of the defendants, had recovered a judgment in ejectment against Nicholas and Owen Wessels, two of the plaintiffs. The defendant J. T. C. claimed title as heir-at-law of Archibald Carscallen, who was heir-at-law of J. Carscallen, and insisted that the conveyance of Esther C. being void for want of power to convey, he was entitled to succeed as heir-at-law of John C.

*Held* that Esther Carscallen having a power coupled with an interest, the conveyance was good, and the plaintiffs were entitled to prevail.

EJECTMENT for lot No. 15, 4th concession of Murray. Writ tested the 4th of February 1860. Defence general. Plaintiffs claim as devisees and heirs-at-law of John Wessels, who held by deed of bargain and sale from Esther Carscallen, executrix and devisee of John Carscallen, from whom the defendants claim title. Defendant John T. Carscallen claimed title by deed from one John G. Clute and Mary Ann McNab to John Carscallen, also as heir-at-law of Archibald Carscallen, who was heir-at-law of the above named John Carscallen. Defendant Stephen Crandell claims as tenant to John T. Carscallen.

The trial took place before Sir *J. B. Robinson*, C. J., at Cobourg in April 1860.

The will of John Carscallen was put in, bearing date the 11th day of August 1828. It was produced from the office of the registrar of the surrogate court for the Midland District, and annexed thereto was an affidavit of Esther Carscallen, sworn on the 16th of February 1829, in which she proved the will in the usual form for probate. By this will, after disposing of other real estate and of personal property, the testator did "authorise and empower" his executrix and executors, or a majority of them, to sell and dispose of

all his lands situate in the township of Murray, in the District of Newcastle, and to give sufficient conveyances for the same in fee ; and he directed how the money to arise from such sale should be appropriated. And then came this clause—"And lastly, all the rest and residue of my estate, as well real as personal, I give, devise, and bequeath to my beloved wife Esther Carscallen, to be disposed of by her as she shall see fit." And he appointed his wife executrix, and George Carscallen, Elias Dulmage, and Isaac Fraser executors. The testator died on the 4th of August 1828.

By indenture dated 13th of February 1833 Esther Carscallen, describing herself as "*administratrix*" to the estate of the late John Carscallen, in consideration of £75, bargained, sold, &c., unto John Wessels in fee the land claimed in this action. This deed was registered on the 6th of April 1835. It was further proved that the full consideration money was paid to her, and was applied by her in conformity with the directions in the will. John Wessels, the father of the plaintiffs, went into possession in 1831 or 1832 (Esther Carscallen had sold and given a bond for a deed some time before actually conveying). His son Nicholas went into possession with him, and afterwards Owen Wessels, another son of John, moved on to the west part of the lot. One or other of them occupied the lot until they were turned off about two years before the trial.

John Wessels by his last will, dated 26th of October 1850, devised to his son Nicholas in fee the east half of No. 15, 4th concession of Murray, and to his three younger sons—John, Owen, and Esrom—the west half of the same lot in fee, as tenants in common. This will was registered the 14th of August 1854.

The defendant proved that Esther Carscallen, Elias Dulmage, and Isaac Fraser, executrix and surviving executors of John Carscallen, on the 23rd of February 1833, joined in making a conveyance, in consideration of £150, of lot No. 32, 2nd concession, and lot No. 16, 3rd concession, of Murray in fee. The witness stated that the executors had all been sued before they made this deed, and that George Carscallen, the fourth executor, died before this deed was made.

The defendants also put in an exemplification of a judgment in ejectment entered upon a verdict whereby John T. Carscallen, one of the defendants, recovered possession of this lot No. 15, 4th concession of Murray, against the two plaintiffs in this cause, Nicholas and Owen. This judgment was entered in B. R. on the 27th of August 1857. By indenture dated the 28th of August 1857 John T. Carscallen demised and leased to the same two plaintiffs in this cause, Nicholas and Owen, this same lot, *habendum* for six months and three days from that date, *reddendum* £25, with the usual covenants, including one to give up possession at the end of the term.

On the 10th of October 1859 John T. Carscallen recovered another judgment in ejectment against Nicholas and Owen Wessels, and they were turned out of possession.

It was further proved that the defendant John T. Carscallen was eldest son and heir of Archibald Carscallen, who was eldest son and heir of John Carscallen, the devisor above mentioned. Upon this state of facts the defendants obtained a verdict, leave being reserved to move the court to enter a verdict for the plaintiffs.

And in Easter Term *Hector Cameron* obtained a rule *nisi* accordingly.

*J. H. Cameron*, Q. C., shewed cause.

For the plaintiffs were cited *Williams' Executors*, 245, 250; *Stacey v. Elph*, 1 My. & K. 195; *MacIntosh v. Barber*, 1 Bing 50; *White v. Vitty*, 2 Russ. 484, 4 Russ. 584; *Statham v. Bell*, Cowp. 40; *Bernard v. Minshull*, 5 Jur. N. S. 931.

For the defendants, *Howe v. Dartmouth (Earl)*, 7 Ves. 147; *Broome v. Monk*, 10 Ves. 605; *Hill v. Cock*, 1 V. & B. 175.

DRAPER, C. J.—The statute of disclaimers (21 H. 8., c. 4) in effect enacts that where part of the executors of a person, directing by will that his lands shall be sold, refuse the charge of the will, while the rest of them accept it, the

sales by the accepting executors shall be as effectual as if those who refused had joined.

In the present case the testator authorises and empowers his executrix and executors, or a majority of them (not then naming any of them), to sell.

It seems settled that a party appointed an executor may refuse to act as such, and yet may execute a power over land. *Gibbons v. Marltiward*, Moore 594, Poph. 6. And if instead of a mere power the estate had been devised to him, he might by deed without matter of record have disclaimed. *Townson v. Tickell*, 3 B. & A. 31; and see *Nicolson v. Wordsworth*, 2 Swans. 365. The difficulty that arises here is not with a purchaser unwilling to take a title from the executrix only (Year book, 15 H. 7, 11 b.; 19 H. 8, fol. 9, pl. 4); it is the heir-at-law insisting that the conveyance to the purchaser was an ineffectual attempt to exercise the power, and therefore that the title of the present plaintiffs fails.

The difficulty is somewhat increased by the fact that two others of the executors did, not long after the conveyance by the executrix alone, join in a conveyance of some of the testator's lands, thereby in effect executing the power. It was explained that they were sued, as I understand, upon a bond given by their testator to convey; that they never did prove the will, or act either as executors or under the power except in that instance, and then only to relieve themselves from the suit. The jury might, I think, have found a disclaimer in fact, and after a lapse of more than twenty-five years I should not have been disposed to disturb their conclusion, but it does not appear that any such question was left to them.

But assume that the power was not well executed, to whom did the estate pass? Who was entitled to the rents and profits from the time of the testator's death until the power to sell for the payment of his debts was exercised? The will of John Carscallen shews an evident intention on his part not to die intestate as to anything real or personal. He bequeaths to his eldest son Archibald five shillings. And at the end of his will he gives absolutely to his widow

all the rest and residue of his estate, as well real as personal. He had made no previous actual disposition of this land, though he had empowered his executors or a majority to sell it and apply the proceeds for certain specified purposes. It appears to me impossible to hold that for an instant this land ever descended on the heir-at-law. The residuary devisee was entitled to it until the power was exercised. Those interested in the application of the proceeds of the estate when sold would have had a right to urge the sale, but they had no cause of complaint, for the estate was in fact sold and the proceeds properly distributed. But it was said the sale professed to be an execution of the power, and being ineffectual in that view, it cannot otherwise be effectual, and therefore the land remains unsold, or rather unconveyed, for it has been sold and paid for, and so the plaintiffs have no title. I think we may well answer such an objection in the words of Lord *Alvanley*, in *Cox v. Chamberlain* (4 Ves. 637)—“It would be monstrous in this case to hold that where there is a power and an interest, and the act being equivocal, it is doubtful whether he acted under the one or the other, the court should adopt that which would defeat the instrument.”

See *Cambridge v. Rous*, 8 Ves. 12; *Easum v. Appleford*, 5 My. & Cr. 56; *Bonifaut v. Greenfield*, Cro. El. 80.

If the conveyance by Esther Carscallen cannot be held to be a good execution of the power, which I do not mean to decide, it may well enure as a conveyance of her interest as residuary devisee, and passed the land to John Wessels, under whose will the plaintiffs claim.

The only remaining question is as to the effect of the two recoveries in ejectment, and of the fact that two of the plaintiffs accepted a lease for six months from the defendant John T. Carscallen, which term however expired long before this action was brought.

As to the recoveries in ejectment, *per se* no reliance was placed upon them. They establish only that the claimant therein was entitled to the possession of the land at the date of the respective writs. The form of the verdict given in the schedule to the Common Law Procedure Act 1856,

No. 16, "that the claimant on, &c. (the date of the writ) was and still is entitled to the possession of the land within mentioned," coupled with the 261st sec., as to the effect of a judgment in ejectment, is, I think, sufficient on this point.

Then as to the lease. It could only be an estoppel between the defendant John T. Carscallen and the plaintiffs Nicholas and Owen, and as between them it could operate no farther than as estopping these plaintiffs from denying Carscallen's right to possession during those six months, and if they had entered under him, they might also be compelled to return the possession to him, even after the expiration of the term. Admitting that this would be the effect, they are not thereby estopped from shewing their present right, even although in so doing they cannot avoid shewing that they possessed the same right when they accepted the lease. I have seen no authority, nor do I perceive any reason, why a man who accepts a term of land to which he is really entitled, can or ought to be estopped from setting up that title at or after the expiration of such term, against the grantors thereof.

On the whole, I am of opinion this rule should be made absolute.

*Per cur.*—Rule absolute.

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### JOHNSTONE V. SMITH, SHERIFF.

*False return to fi. fa.*—Action for against sheriff—Surety—Competency of as a witness.

*Held* that the endorser of a promissory note, a judgment upon which has been recovered against the maker, and which he (the endorser) has not paid, is a competent witness in an action brought against a sheriff for a false return to a *fi. fa.* issued on the judgment.

#### Case for a false return.

The first count stated a judgment recovered against one Peter O'Banyon, and a *fi. fa.* thereon directed and delivered to defendant, endorsed to levy £192, 16s. damages, £3, 17s. 2d. costs of suit with interest, 20s. for the writ, with sheriff's fees, &c. By virtue whereof defendant seized goods of O'Banyon of the value of the moneys endorsed on the writ, and levied the same thereout, and afterwards made the wrongful,

false, and deceitful return following: "By virtue of this writ," &c., "I made of the goods and chattels the sum of £142, 1s. 7d., besides disbursements; that I paid rent due on the premises of defendant £101, 5s.; paid on an execution in my hands prior to this in a suit of Cleghorn v. O'Banyon £10, 16s. 7d., and deducted my fees and charges £3, 3s. 9d., leaving a balance of £25, 16s. 3d. made on this writ, which I have ready; and I further certify that the within defendant hath not any other goods and chattels in my bailiwick," &c.

The second count set out, as in the first, to the delivery of the *fi. fa.* to the defendant, and averred that there were goods of O'Banyon within defendant's bailiwick, and defendant might have levied the moneys so endorsed, of which defendant had notice. Yet defendant did not levy such moneys, but refused and neglected, and afterwards wrongfully, falsely, and deceitfully returned the return set out in the first count.

*Pleas*—1. Not guilty. 2nd. To the first count, that he did not, under the said writ, as such sheriff, seize or take the moneys endorsed on the writ, other than the moneys in the said return, or any part thereof, out of the said goods. 3rd. To the second count, that there were not any goods of the said O'Banyon, besides the goods in the said return, mentioned, sufficient in value to satisfy the writ within the defendant's bailiwick, whereof defendant had notice.

Replication to 2nd. *plea*:—That the defendant did seize and take other moneys than the moneys in the return mentioned, and the appropriation of the moneys in the return admitted was unlawful, fraudulent, and false. To the 3rd *Plea*.—That there were goods of O'Banyon within defendant's bailiwick, other than the goods in the return mentioned, whereof defendant had notice, sufficient to satisfy the moneys endorsed on the writ, and that the payment of the alleged rent and of the other *fi. fa.* out of the goods seized under the said writ, as in the return alleged, was false, fraudulent, and unlawful.

The trial took place at Brantford in April 1860, before *McLean, J.* The writ was placed in the sheriff's hands on the 7th of February 1859, and he was informed of the property which O'Banyon had liable to be taken in execution,

and was told to get the money as fast as he could. It was proved by the attorney for the plaintiff in the suit against O'Banyon that one William Matthews was the party beneficially interested in that execution. The deputy sheriff swore that there was an understanding between him and Matthews that the execution should not be enforced against any of the property seized till after the growing crops were harvested, but he would give no written authority to that effect. The plaintiff's action against O'Banyon was on a promissory note endorsed by Matthews, and by George S. Wilkes, who was O'Banyon's landlord. Matthews was called and admitted as a witness by the learned judge, the defendant's counsel objecting. He said he was interested that the plaintiff should recover against O'Banyon, as he (Matthews) was liable to plaintiff as endorser of O'Banyon's note; but he denied expressly that he instructed the deputy sheriff to delay proceedings, but he said he told him he would not interfere least some subsequent execution should take precedence, but he said he was anxious to raise money to enable O'Banyon to harvest his crops, and it was his wish that he should have till after harvest before the sale of his effects. *It appeared that there was an execution in the defendant's hands against the goods of O'Banyon, which had priority over the plaintiff's writ.* It was issued from the county court on the 21st of July 1858, at the suit of Amos Cleghorn, and was received by the sheriff on the same day, and was renewed for one year on the 30th of June 1859, debt and costs £40, 17s. 3½d. with costs of writ, &c., &c.; £40, 5s. had been paid before the sale of O'Banyon's goods. The sheriff's officer, Woodham, went with the plaintiff's execution to O'Banyon's place on the 9th of April 1859. O'Banyon, as to his tenancy, swore that he rented the premises from Mr Holmes in the first instance, that afterwards Mr Wilkes bought the farm, and O'Banyon agreed to pay him a money rent for it. He could not state whether he agreed with Mr Holmes to hold from the 1st of April; he was to pay rent within a year from the day the bargain was made; he entered on the 10th of April. Mr Wilkes stated that "he considered the rent due on the 1st of April;" that he had assigned to Mr Cleghorn the

rent due at the time the execution was in the sheriff's hands. A notice claiming £100 rent for one year, due on the 1st of April 1859 by O'Banyon, in respect of the premises occupied by him, and signed "George S. Wilkes, per Allen Cleghorn, assignee and attorney," was proved, and the sheriff was therein told not to remove the goods and chattels from off the premises without satisfying the rent.

The jury found for the plaintiff, \$390 damages. In Easter Term *M. C. Cameron* obtained a rule *nisi* for a new trial on the law and evidence, and the verdict being contrary to the judge's charge, and for the reception of improper evidence in admitting William Matthews as a witness, who was the person on whose behalf the action was brought.

*R. A. Harrison* shewed cause. He cited *Wharton v. Naylor*, 12 Q. B. 673.

*Cameron, M. C.*, contra, cited *Waring v. Dewberry*, 1 Strange 97 (but see *Andrews v. Dixon*, 3 B. & Al. 645, and *Smith v. Russell*, 3 Taunt. 400, contra); *Peacock v. Purvis*, 2 B. & B. 362; *Wright v. Dewes*, 1 A. & E. 641.

DRAPER, C. J.—There seem to be two points:—1st. Whether the rent was due by O'Banyon at the time the goods were taken in execution.

2nd. Whether Matthews was an admissible witness.

As to the first, the dates of some facts which I take to be material seem settled. The sheriff on the 21st of July 1858 received the *fi. fa.* in Cleghorn's suit against the goods of O'Banyon. But it was renewed on the 30th of June 1859, whence it may be inferred it was unexecuted on that day. I should infer, though there is no evidence expressly on the point, that the sheriff had made no actual levy under it until he went to O'Banyon's premises, when he had the writ of Cleghorn and the plaintiff, which he had received on the 7th of February preceding. On that day the seizure was made, and as the landlord can only claim the rent due at the time of taking the goods, and not that which accrues due after the taking and during the continuance of the sheriff in possession, it becomes important to know on what day O'Banyon's rent was due and payable. No objection is

raised on either side with respect to the direction to the jury on this point, nor does the learned judge's report convey any information upon it; we must presume they were properly directed, and found that the rent was not due until after the taking of the goods; and the weight of evidence appears to me in favour of that conclusion.

Then as to Matthews being a competent witness, the question was whether the action was brought in his immediate or individual behalf, for if not, he is not disqualified because he had an interest in the event of the trial. His situation was this: he was liable to the plaintiff for the same debt of which the plaintiff was enforcing payment by the execution against O'Banyon, being an endorser upon the promissory-note on which the judgment was recovered and the execution issued, and on this account probably the plaintiff allowed Matthews to interfere, and to some extent, at least, direct and control the instituting the suit against O'Banyon and the proceedings therein. But it was not pretended that he had paid the plaintiff the amount of the note, and that the suit was carried on for his benefit, and to enable him to recoupe himself. He was liable on the note, and if O'Banyon did not pay he must; but as long as things continued in that state he would, as I think, have been a competent witness in the plaintiff's suit on the note against O'Banyon, and if so, I do not see why he is not competent now. That he has an interest in the plaintiff's obtaining satisfaction from O'Banyon is true, but it does not follow from that that this suit is brought on his immediate or individual behalf, and he swears it is not; I think, therefore, he was a competent witness.

In my opinion, the defence fails on both points, and the rule should be discharged.

*Per cur.*—Rule discharged.

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## IN RE SMITH AND THE CITY OF TORONTO.

*By-law—Illegality—Uncertainty.*

The court will only quash a by-law in the whole or in part for illegality ; want of clearness of expression or a difficulty in construing or applying its provisions being no sufficient grounds to support an application to quash it.

In Trinity Term (1859) *Hallinan* obtained a rule *nisi* to set aside by-law numbered 5 of the Corporation of the City of Toronto, or to quash the third and sixth sub-sections of sec. 11 of the said by-law, on the grounds:—1st. That sub-section No. 2 was uncertain and void because it was impossible to comply with its provisions ; that sub-section 3 was also void for uncertainty, and that sub-section 6 was also void because it did not specify what a holiday meant. 2nd. That section 16 was also void because it did not provide for a uniform rate of licence. 3rd. That section 18 was void as exceeding the powers given to the corporation by statute, and why by-law No. 14 should not be quashed, with costs on the ground last aforesaid.

The by-law was verified in the usual manner, and there was an affidavit of the relator that he was a resident ratepayer of the city and paid to the inspector of licences £18 for a license to keep a tavern and retail spirituous liquors for one year ending on the last day of February 1860, which license had been annulled for an alleged breach of the by-law.

The rule was served on the 26th of August last, but no cause has been shewn to it.

During Hilary Term it was spoken to by *Hallinan* for the complainant.

DRAPER, C. J.—The by-law in question is for licensing and regulating hotels and places of public entertainment, and was passed on the 4th of February 1859. Sub-section 2 of section 11 requires that the inspector of licenses shall be satisfied that the owner of the house or premises for which the license is sought, together with at least two-thirds in number of the ratepayers residing or doing business on the

street or lane where the premises are situated, and within a distance of 200 measured yards from the premises, have signed a certain certificate. Or if the premises are situate within any gateway or court, or in any lane, alley, or street less than 300 yards in length, then the distance as aforesaid shall be measured along any other street or lane from which such gateway, court, lane, alley, or short street may be entered. The form of certificate is then given.

Sub-section 3 requires that every tavern paying a license fee of not more than \$52 shall be at least 750 feet area on the ground floor and two stories in height, and have at least one sitting room, one kitchen, and four distinct bedrooms apart from the bar or public room, and over and above such rooms as are occupied or used by the family of the person keeping the said house, and shall also have convenient stabling for at least four horses, and there shall also be on the premises such privies, water-closets, or other conveniences as may be necessary to the cleanliness thereof, the whole of which, together with all other parts of the house, shall be well drained and ventilated, and shall be at all times maintained in a clean and wholesome state and in good repair.

Sub-section 6 imposes a penalty of \$40 on every person convicted of selling intoxicating liquors on Sundays or holidays.

Section 16 imposes a duty or fee on every tavern license of \$52, and provides that if any premises for which a license is sought shall not have the requisite area, stabling, and apartments, the inspector may charge the applicant the further sum of \$20 for the want of such full accommodation.

Section 18 provides that in case any person who has taken out a license is convicted of a breach of any of the provisions of the by-law, such person shall, in addition to the penalty, absolutely forfeit his license for the remainder of the current year; and in case of any appeal from such conviction, the license shall be suspended and treated as annulled until such appeal has been decided.

By-law No. 14, passed the 20th of June 1859, repeals the foregoing 18th section, and enacts that in case any person who has taken out a license under by-law No. 5 is con-

victed of a breach of any of the provisions thereof, the police or other convicting magistrate shall have the discretion, in addition to the penalty imposed, absolutely to forfeit the license of the party convicted for the remainder of the time for which such license was granted. There is a second section, but no notice was taken of it in moving the rule.

As to the 18th section of by-law No. 5, it was repealed on the 20th of June 1859, and before this application was made. It is therefore unnecessary to speak of it. Its provisions are in part renewed by the by-law No. 14, which is moved against.

By the 264th section of chapter 54 of Consolidated Statutes, U. C., jurisdiction is given to certain magistrates, upon convicting the keeper of any inn, tavern, ale or beer-house, of having a riotous or disorderly house, to annul his license or suspend it not more than sixty days. This by-law No. 14 professes, in case of a conviction for a breach of any of the provisions of by-law No. 5, to empower the convicting justice to forfeit the license of the party convicted. Now, there are provisions in the by-law, a breach of which certainly would not justify a conviction under the section of the statute above quoted. Such as are contained in sub-sections No. 4, 5, 6, & 9 of section 11 of this by-law No. 5, and the by-law No. 14 does consequently authorise the forfeiture of the license in cases where the statute gives no such power. Again, sub-section 5 of this section 11 contains different provisions as to the closing and keeping closed bar-rooms from Saturday night to Monday morning, from those in the statute 22 Vic., ch. 6, which provides punishments increasing in severity upon repeated convictions, but does not make forfeiture of the license a punishment, even after repeated offences, unless, indeed, the repetition should be held to amount to the keeping a disorderly house, which by-law No. 14 would authorise a forfeiture of the license on the first offence. The only words in the statute under which this by-law could be held within the power of the municipality are contained in the 5th sub-section of sec. 246 of ch. 54, already cited, which authorises the passing of by-laws "for *regulating* the houses or places licensed," and

looking at the whole of the legislation respecting taverns, it does not appear to me that "*regulating*" means annulling the license. It is true the terms *prevent* and *regulating* as applied to the running of dogs at large, have been construed to authorise the passing of a by-law directing their being shot, but that decision rests upon grounds not applicable in this case. In my opinion this clause of by-law No. 14 must be quashed. The second section is merely inoperative and requires no notice.

I think the objections to sub-sections No. 2 & 3 are more in the nature of a demurrer to form than to substance, and I am not disposed to give the slightest countenance to motions to quash by-laws, on any ground such as a want of clearness of expression, or a difficulty in construing or applying its provisions. If it be impossible to apply its provisions, they will remain unapplied; if they are uncertain, there may be difficulty in construing and acting upon them, but we are not to be called upon *a priori* to discuss and determine such questions. Illegality is the only ground mentioned in the act on which this court can quash a by-law in the whole or in part.

The objection to the word *holidays* in sub-section 6 may be disposed of in the same manner. The interpretation act might, however, be referred to as a guide for the meaning of the term, though that refers only to the meaning of the word holiday in legislative enactments.

As to section 16, Mr. *Hallinan* did not refer to any statute which requires that every tavern license should have the same duty or fee charged upon it. But as regards a *tavern license*, I am not satisfied this section might not be upheld, even if such be the law. Sub-section 3 prescribes what a tavern paying this uniform license fee of \$52 shall be as to size and accommodation. The proviso to sub-section 16 may be held to constitute a different class of houses of public entertainment, for which a license fee of \$72 must be paid. And as the tendency of this proviso is to check the keeping of small houses, ill-adopted for the more useful and legitimate purposes of an inn, I would not interfere with it unless on a clear conviction that it was illegal.

The rule, therefore, as to by-law No. 14 must be made absolute with costs. As to No. 5, I think it should be discharged with costs.

Rule accordingly.

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### PARKS V. DAVIS.

#### *Division court clerks—Securities by—Allowance of—Filing.*

*Held* that it is the duty of the county judge to fix the amount and number of sureties to be given by the division court clerk before his entering on his duty as such clerk.

2nd. That a count admitting the proper direction as to the number and amount of sureties, but not alleging any loss or injury resulting from the non-filing or otherwise of such securities, or shewing any damage to have arisen to the plaintiff thereby, held bad on demurrer.

3rd. That a count admitting the fulfilment of the requirement of the statute, but denying that the sureties were freeholders or residents of the county, held bad on demurrer.

4th. That the county court judge is not responsible for the filing of the securities of the division court clerk.

5th. That the non-filing of the security as required by the statute would not relieve the sureties of a division court clerk from their responsibility as such sureties, but that the other provisions being complied with, they are liable whether the security is filed or not.

The first count of the declaration stated that the justices of the peace of and in the county of Halton, in general quarter sessions assembled, did declare and appoint the limits and extent of six divisions within their county, and did number the said divisions, and did declare and appoint the limits and extent of one, to wit, the fifth of such divisions, to comprise the township of Nassagawega, and the court to be held in the said division was known by the name and style of the fifth division court of the county of Halton, and the defendant was appointed sole judge of the county court of the said county of Halton, and the said defendant did during the continuance of his said appointment, by virtue of and under an act passed in the 13 & 14 Vic., intituled, "an act to amend and consolidate the several acts now in force regulating the practice of division courts in Upper Canada, and to extend the jurisdiction thereof," appoint one John B. Chisholm to be the clerk, and the plaintiff to be bailiff, of the fifth division court aforesaid, and the defendant omitting his duty in that behalf, did not direct for what sum and with how many sureties the said John B. Chisholm as such clerk should give

security, but wrongfully and injuriously wholly omitted and neglected so to do, and the said John B. Chisholm as such clerk as aforesaid did not give such security as by law was required, and did not enter into such covenant as by law was required, and the said John B. Chisholm as such clerk as aforesaid afterwards entered upon the duties of his said office by the permission and sufferance of the defendant as such judge as aforesaid without having given such security and entered into such covenant as by law was required, and the plaintiff afterwards entered upon the duties of his said office; and a large sum of money, to wit, the sum of one hundred pounds for certain fees, became due during the continuance of the said appointment of the defendant to his said office, and payable by the said John B. Chisholm as such clerk to the plaintiff as such bailiff, and the plaintiff, in fact, says that the said sum (although it has been duly demanded) has not, nor has any part thereof, been paid to the plaintiff, and by reason of the premises the said plaintiff hath been and still is wholly deprived of the means of satisfying the said sum, and of the benefit of such security and covenant as aforesaid.

2nd count same as first, except alleging that security was given as required, but not approved; and that he, Chisholm, was allowed to enter on the duties of the office without such approval. Alleging the same damage.

3rd count alleged the appointment of Chisholm, the giving of security, and approval thereof as required, but that the sureties were not freeholders as required; yet defendant allowed Chisholm to enter on the duties of the office, alleging damage as in first count.

4th count alleged the performance of all duty required by the statute except the filing the security, and that defendant wrongfully permitted Chisholm to enter upon the duty of the office; and damage as before.

5th count similar to 4th.

To this declaration the defendant demurred to all five counts, assigning the following causes—that the 1st, 2nd, 3rd, 4th, and 5th counts do not allege a breach by the defendant of any duty which by law the defendant was

bound to have performed, and for the breach of which the plaintiff has any right of action. That the said counts shew that the bond not having been completed and filed, the said Chisholm was not legally entitled to enter on the duties of the office of clerk, and therefore the said fees were not payable by virtue of the said office. That the alleged defects in the security of the said Chisholm are alleged to have existed when he entered on the duties of his office, and it is not alleged that such defects were not afterwards supplied. That the said counts do not shew that the said fees were any of those fees which the clerk was by law authorised to receive for the bailiff's use; that it is not shewn that the plaintiff before entering on the duties of the office of bailiff had given and filed the securities required by law, and therefore it does not appear that the said fees were lawfully payable to the plaintiff.

*C. S. Patterson*, for the defendant, cited 13 & 14 Vic., ch. 53, sec. 22; *Kepps v. Wigget et al.*, 10 C. B. 35.

*Eccles*, Q. C., contra.

DRAPER, C. J.—The clerk of the division court is expressly prohibited from entering upon the duties of his office until the covenant of himself and sureties is filed in the office of the clerk of the peace.—Consolidated Statutes, U. C., ch. 19, sec. 26.

Such clerk must give security by covenant, with so many sureties, being freeholders and resident within the county, and in such sums as the county judge may direct, and shall, under his hand, approve and declare sufficient.—*Ib.* sec. 25.

The judge of the county court has the power of appointing and removing division court clerks.—*Ib.* sec. 23.

The first count alleges that the defendant, the county judge, did appoint one C. to be clerk of a particular division court, but that omitting his duty in that behalf he did not direct for what sum and with how many sureties C. should give security, and C. did not give security or enter into such covenant as by law required, and that C. entered upon the duties of his said office by the permission

and sufferance of defendant as such judge, without having given security, and then states the receipt by C. of moneys belonging to plaintiff, and plaintiff's loss of them from C.'s inability to pay.

It appears to me the duty of directing in what sums and with how many sureties C. should give his covenant is a ministerial duty. It may be said that it is *quasi judicial*, because the sums are to be fixed as a matter of discretion, and likewise the number of sureties. But however that might be a good answer if the charge were that the sums were too small, or the sureties too few, yet the duty of directing some sum, and some number of sureties, of enabling the clerk to fulfil the condition precedent to his entering on the duties of his office, appears to me to be properly viewed as a ministerial act, the neglect of which may give a party injured a right of action, when such neglect is followed by permitting the clerk to enter on his duties without giving any security, and the plaintiff sustains loss from the clerk's misconduct, against which the security is required to be given.

The duty to fix the amount of security and the number of sureties is clear, and it is admitted by the demurrer that this duty was not discharged. But the plaintiff could not shew that he had sustained loss simply from this omission, because the obvious and legitimate consequence would have been that the clerk could not legally enter upon the discharge of his duties. It is therefore added that the clerk did enter on such discharge by the permission and sufferance of the defendant without having given security. The defendant as judge had the power to remove the clerk as well as to appoint him, and it would seem that the substantial cause of action was the permitting the clerk to enter upon the duties of office without giving security. For whether the defendant had directed, in accordance with the statute, what the security should be or no was a matter of indifference, unless the clerk entered upon the duties of his office. Was it, then, the duty of the judge not to permit and suffer the clerk to enter, &c. I think it was, for the whole matter rests with the judge—the appointment, the determination as to the

necessary security, and the removal if the security be not given. The appointment of the clerk is a duty the neglect of which might cause injury to suitors; the neglect to do what was requisite to enable such clerk to fulfil the condition precedent to entering on his duties is equally a breach of duty, and as on the one hand I think the allowing the office to remain practically vacant, by not rescinding the appointment of one who failed to fulfil the condition precedent, would be a breach of duty, so on the other I am of opinion that the suffering the clerk to enter on the duties without giving security is equally a breach of duty, and gives a right of action to the party grieved. I think, therefore, the first count substantially good, though in the form of allegation it might be improved.

The second count appears to me to be in part founded on the same breach of duty, namely, that of permitting the clerk to enter on his duties while his sureties had not been approved and declared sufficient by the judge under his hand. This count admits a proper direction as to the amount of security and the number of sureties, and a compliance on the part of the clerk with that direction. Still the statute requires the covenant of the clerk and his sureties, approved as aforesaid by the judge, to be filed with the clerk of the peace before the clerk enters on his office. If the first count is good, this must so far also be good, for the grievance really is suffering the clerk to take full possession of the office before he had fulfilled certain preliminaries to which the judge was a necessary party, unless a substantial distinction exists on the ground that the approval and declaration of the sufficiency of the sureties is a *judicial* act, while the direction as to amount and number is a *ministerial* one. But I do not feel satisfied to rely on this distinction. It is not the approval of insufficient sureties that is complained of, but the permitting the clerk to enter on his duties without any approval being given. It is the omission to do the act required, and yet allowing the clerk to proceed as if it had been done; that is the alleged ground of action, and if this were all I should think this count might be sustained for the same reason as the first.

But there is another important distinction between the two counts. The first states that the clerk gave no security, and avers that the plaintiff was entitled to money from the clerk, which though demanded was not paid, whereby the plaintiff was deprived of the means of satisfying (obtaining satisfaction for) such money, and of the benefit of such security. But this count admits the security was given in the amounts, and with the number of sureties directed by the judge, and though it states the receipt of money and the deprivation of remedy, exactly as in the first count, this consequence, which may well follow the breach of duty charged in the first count, does not necessarily or by reasonable intendment flow from the premises in the second; the absence of the judge's approval would be no defence either by the clerk or his sureties, any more than the absence of a rule for the allowance of bail to an action would discharge them from their recognizance. It is not averred that in consequence of the absence of approval the covenant was not filed with the clerk of the peace, or that the plaintiff could not obtain access to it so as to bring an action thereupon. The count therefore shews no damage resulting to this plaintiff from the alleged breach of duty, and this is, I apprehend, one of those cases in which, without shewing actual damage, the plaintiff cannot maintain his action. For this reason, therefore, I think this count bad.

The third count differs materially. There it is admitted that the covenant with sureties was entered into and approved of as sufficient, but it is asserted that in fact the sureties were not freeholders nor resident in the county. There is no averment that the defendant approved of sureties not qualified according to the statute knowingly and in wilful disregard of his duty, and without going further I think this count bad.

The fourth count is also bad in my opinion. The non-compliance with the statute which it alleges is that the covenant of the clerk and his sureties, though duly approved, was not filed in the office of the clerk of the peace, and yet defendant suffered the clerk to enter on his duties. No duty

in regard to the filing is imposed on the judge, and it is not averred that he had notice that the covenant was not filed, or that it was his duty on such notice to have removed the clerk. And though it is averred that the clerk entered on his duties and continued in office *before* the covenant was filed, it is not said that the covenant was not filed before this action was brought, nor is the alleged damage shewn to be in any way connected with the not filing of the covenant.

The fifth count is similar to the fourth, except that it charges that the defendant negligently, &c., did not remove the clerk from his office when the covenant had not been filed. It is open to the same objections as the last. The only argument lodged in support of the last three counts of the declaration was, that till the clerk had completely fulfilled the condition precedent he could not enter on his office, and therefore could not be said to have received the moneys to which the plaintiff laid claim, *virtute officii*, as clerk. That as a consequence the sureties were not responsible for these moneys, since, though they came to his hands while *de facto* in office, they were not received by him as *legally* possessed of the office, because their covenant had not been duly filed, and therefore it was inferred the judge was responsible for a breach of duty in permitting him to enter into office and in not removing him. But I think no such inference deducible from the facts which are alleged, nor do I agree that the sureties would not be liable though their covenant never was filed at all.

Judgment for plaintiff on 1st count, and for defendant on the rest.

See *Floyd v. Barker*, 12 Co. 25; *Groenvelt v. Burwell*, 1 Ld. Ray. 454; *Hamond v. Howell*, 1 Mod. 184-2, Mod. 219; *Garnett v. Ferrand*, 6 B. & C. 626; *Henley v. Mayor of Lyme*, 5 Bing. 107.

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## SHAW V. GAULT ET AL.

*Bill of sale—Registry of—Its operation back to date by—Change of possession.*

*Held* that the registry of a chattel mortgage within the five days from its date, when not accompanied by an immediate delivery, and followed by an actual and continued change of possession, as required by the act, does not cause it to have reference back, and to take effect from its date, nor is it sufficient to pass the property unless it is so filed. The decision in *Feehan* and the Bank of Toronto affirmed.

Appeal from the county court of the united counties of Stormont, Dundas, and Glengary.

This was an interpleader issue to try whether certain goods seized and taken in execution by the sheriff of the united counties of York and Peel under a writ of *fiери facias*, tested the 13th day of December in the year of our Lord 1859, and issued out of the county court of the united counties of Stormont, Dundas, and Glengary at Cornwall, directed to the said sheriff and delivered to him on the 14th day of December in the year of our Lord 1859, for the having of execution of a payment of a judgment of this court recovered by the said Andrew Frederick Gault and Robert Leslie in an action at their suit against John Laidlaw, were at the time of the delivery of the said writ to the sheriff to be executed the property of the said John Shaw.

The following evidence was given at the trial, material to this issue—execution in cause of Gault & Gault v. John Laidlaw, dated the 13th of December 1859, delivered to the sheriff on the 14th of December 1859, against goods of John Laidlaw. Assignment under seal dated the 13th of December 1859 from Laidlaw to Shaw, filed with the clerk 17th December 1859.

Witness, George A. Piper.—I witnessed the execution of the assignment at 10·50 a.m. on the 13th of December 1859. The keys were delivered over to Shaw, and one piece of goods in the name of the whole; Laidlaw was requested to leave the premises by Mr Cameron, the legal adviser, and he did so; plaintiff then went to his own office and gave a letter of instruction to his salesman Thomas Byrnes, and sent him to the premises to manage the business; Shaw & Co. were creditors to the amount of over £6500; the whole indebtedness of Laidlaw was £12,000.

Cross-examined.—Laidlaw's name is still on the doors of the premises; I saw Byrnes ther eafter the assignment taking stock, and I know that Laidlaw was requested by Shaw to assist in taking stock after the assignment.

John Laidlaw.—I was a merchant in Toronto; I made the assignment; previous to making it the Messrs Gault brought two suits against me; I wrote to them to say that if they pressed I would be compelled to make an assignment in order to give the other creditors an equal share; I defended the suits in order to give time to settle with all the creditors; I recognise the agreement filed, first, as the basis of the agreement signed on the 19th of November 1859, but not signed by Gault; Mr Piper's statement is correct; the assignment was a *bona fide* arrangement to benefit all the creditors; I delivered over all my effects to Shaw under this assignment; the keys of the safe and of the doors were given over to him about half-past 10 a.m.; I told the clerks that I was no longer their master, and then left the premises and did not return till next day; on next day I asked Shaw if he required my assistance; Byrnes was then in charge of the establishment; Shaw said he wished me to assist Byrnes in taking stock—he engaged me.

Cross-examined.—I believe that the accounts were rendered after the assignment in the name of Shaw.

The defendant's counsel objected that the assignment was not complete till after the seizure, inasmuch as the affidavits were not sworn to until the 17th of December.

2nd. The assignment was not filed till the 17th; the registry does not refer back to the date of the assignment, and the seizure being on the 14th, will hold the goods.

3rd. There is no sufficient description of the goods or of the household furniture in the assignment.

4th. The evidence of change of possession is not sufficient.

5th. No evidence of the delivery of the furniture.

6th. An assignment is not good until executed by a creditor, and no creditor has signed it.

Exemplification of judgment against Laidlaw, entered on the 13th of December, at the suit of Gault & Co., put in.

Execution issued on that judgment same day.

Henry Skynner, deputy sheriff of York and Peel.—The execution in this cause was placed in my hands against Laidlaw; I received it on the 14th of December 1859, and went immediately and made a seizure; I saw Laidlaw and his clerks in full possession, as I supposed; I went up stairs, but could not see any person there in possession; Laidlaw told me that an assignment had been made; this was about 1.05; I went to Mr Cameron to see the assignment; he did not refuse to let me see the assignment, but made some excuse; I did not seize the furniture; one of the bailiffs was in possession of it until the bond was given by Shaw; there were other executions in my hands which were before the assignment, and which have been paid by Laidlaw and by some other person whose name I do not know; I have not been in the shop since, until a few days ago; Mr Laidlaw was there, but not Byrnes—he was, I think, ill.

Upon this evidence the jury gave a verdict for plaintiff, and stated that there had been an immediate delivery of all the property, and an actual and continued change of possession. By consent of parties the same jury was sworn, and a verdict by consent taken on the other interpleader issue on the same points and to the same effect.

A rule being granted and argued before the judge of the county court in the following term, the verdict was upheld and the rule discharged.

The defendant appealed from the judgment of the said judge discharging the rule *nisi* for a new trial, and contended that the said rule *nisi* should have been made absolute upon, among others, the grounds following:—

1st. That the verdict for the plaintiff was contrary to evidence in this, that there was no evidence of actual and continued change of possession of the stock-in-trade and household furniture, or at all events of the said household furniture.

2nd. That the verdict finding a change of possession of the household furniture was contrary to the judge's charge.

3rd. That the description of said stock-in-trade, household furniture, and other property, conveyed or intended to be conveyed in and by the said assignment of 13th of December

1859, was insufficient to pass the said property to the assignee as against creditors such as the defendants.

4th. That the assignment though filed within five days after execution, not having been filed before the day on which the execution of the defendants was placed in the sheriff's hands, was absolutely void as against the creditors of John Laidlaw, the assignor.

5th. That the said assignment was not at the time the said execution was placed in the sheriff's hands properly executed, in this, that the affidavit of execution and of the assignee were not made until after the said executions were placed in the sheriff's hands.

That the defendants are creditors such as contemplated by the statute in that behalf.

That the said verdict is in other respects contrary to law and evidence.

*Harrison* supported the two appeals.

The objections taken on motion for a non-suit were those now urged, clearly no evidence as to change of possession of household furniture. If there was no *actual change* of possession, then the *fi. fa.* came in before the assignment was registered.

Taylor v. Whittemore, 10 U. C. Q. B. 440; Maulson v. Joseph, 8 C. Pl. U. C. 15; Harrison v. Commercial Bank, 16 U. C. Q. B. 447; Olmstead v. Smith, 15 U. C. Q. B. 421.

As to furniture, the verdict was contrary to the charge. The goods were insufficiently described.—Burgess v. Denison, 16 U. C. Q. B. 457; Hutchison v. Roberts, 7 C. Pl. U. C. 470; Howell v. McFarlane, 16 U. C. Q. B. 469; Wilson v. Kerr, 17 U. C. Q. B. 168.

Question of defendants' assent to the arrangement.—Steel v. Brown, 1 Taunt. 381; Edwards v. Harben, 2 T. R. 594; Robinson v. McDonnell, 2 B. & A. 134; Addison, 142.

*McMichael*.—The case resolves itself into two branches—1st. Goods. 2nd. Furniture. The defendant a principal actor in the negotiation for settlement.

The deed is not a composition, but is an absolute assign-

ment for the benefit of creditors. The assignee became no trustee for the creditors but a purchaser, and the consideration was his giving notes to Laidlaw's creditors to pay them.

Then he took stock, the keys, sent Laidlaw away, though he afterwards employed him.

Then should the defendant be heard to raise the question under these circumstances. The first of December does not relate to the assignment, *but to Shaw's notes*.

*Cameron, Alex.*, with *McMichael*.—The defendant was in Toronto when the arrangement was proposed. He distinctly agreed to the assignment.

DRAPER, C. J.—I adhere to the opinion I expressed last Hilary Term in *Feehan v. The Bank of Toronto*, that the filing in the office of the clerk of the county court of a conveyance of goods and chattels, when not accompanied by an immediate delivery, and followed by an actual and continued change of possession, though such filing be made within five days from the executing the conveyance, has no relation back to the time of execution, but under the ch. 45, sec. 4, Cons. Stats. U. C., it is not sufficient to pass the property until it is filed; if not filed within five days from the executing thereof, the sale is absolutely void as against creditors, &c. I think the intention of the Legislature was, not to make a filing on the last of the five days operate as if it had been made on the first, but to fix a limit within which the filing must take place, or the instrument will be wholly void. Every part of the section is adverse to delay. To render unnecessary a written conveyance with affidavit and filing there must be *immediate* delivery, followed by actual and continued change of possession. A conveyance to be effectual under the statute must be *accompanied* by an affidavit of execution, and also by an affidavit of the bargainee or his agent of the good faith of the transaction, negating all idea of *voluntary* postponement, though leaving a reasonable time for diligent observance, but limiting the time for filing under all circumstances to five days. Not, as I conceive, affording encouragement to delay by any relation of the filing to the execution, but leaving the instrument ineffectual as a convey-

ance until filed, and making filing useless unless done within five days. Delay during that period is at the risk of the bargainee as to intermediate events ; delay beyond it renders the instrument inoperative against creditors or subsequent purchasers or mortgagees.

I agree with the judgment of the learned judge of the county court as to the good faith of this assignment and as to the conduct of the defendants in this cause. If they shall ultimately gain any advantage in point of law, they will gain it by the loss of character ; for they have both actively and passively induced other creditors to accept a composition under the belief that *all* the creditors of Laidlaw were coming into it, and now they, and so far as the evidence shews, they alone of all the creditors, are seeking to make void the assignment and to obtain payment in full either at the expense of the assignee, who has given notes to secure the composition, or of the other creditors. Their conduct, in the eyes of every right-minded person, must be regarded as unfair and unconscientious towards all others interested.

But I feel compelled to hold that the plaintiff cannot maintain his claim to goods or furniture against the execution under the bill of sale as an instrument protected by the statute ; not that it is void, for it has been filed within five days, but only as against the execution. Fortunately, however, for the plaintiff and the other creditors, there was evidence of an immediate delivery, and also, though perhaps not so strong, of an actual and continued change of possession, and therefore as to the stock-in-trade, to which this evidence applies, the bill of sale stands independently of the statute, and to that extent the verdict is right in point of fact and of law.

As to the furniture, there is no such proof, and the learned judge rightly directed the jury, who have disregarded his charge. The objection was formally taken in the court below, and has been renewed here, and is, in my opinion, entitled to prevail.

I look so unfavourably on the conduct of the defendants, as disclosed in the proceedings, that I feel called upon to enquire whether they must of necessity succeed, and should

be glad to find that on any sound principle we could withhold our judgment in their favour on this application for a new trial. I do not, however, perceive how on this appeal we could decide that the defendants are not entitled to succeed now, because it may be found that by their own conduct they have estopped themselves from denying that everything mentioned in the assignment had passed to the plaintiff for the benefit of all Laidlaw's creditors. No such question was raised or considered in the court below.

It is possible that an application might have been successfully made to the county court to stay all proceedings on the execution as taken in bad faith, and contrary to the representations and implied, if not expressed, undertakings of the defendants to the Montreal creditors of Laidlaw. There is no proof of what did pass between them except what is contained in the letter of the 24th of November 1859. The absence of any such application may, however, have arisen from the difficulty of obtaining affidavits in Montreal sufficiently strong to sustain it.

I do not see how we can do otherwise than reverse the judgment, discharging the rule *nisi* for a new trial on the ground that as to the furniture the verdict was against evidence and the judge's charge. As the error was that of the jury, we may direct that the rule should be made absolute on payment of costs, and may leave each party to pay his own costs of appeal.

Judgment of the court below reversed and  
rule discharged.

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## SMITH (SHERIFF) V. BERNIE.

*Mortgage—Seizure of under an execution against the mortgagee—Execution against a deceased debtor—Waiver—Pleading.*

Upon an action brought by a sheriff upon a mortgage seized by him under an execution in a suit Smith v. Lawrence, the mortgage being made by B. (the defendant) to Lawrence—

*Held* that a judgment creditor may take the goods of a deceased debtor in the hands of the executor upon a *fi. fa.* against goods if the judgment was recovered within a year before the debtor's death, and that a plea admitting the death of a testator subsequent to the issuing of a *ven. ex.* and *fi. fa.*, and while it was in force, but claiming that by the death the property seized became vested in the personal representatives of the deceased, and was not therefore liable to seizure, was bad.

*Held* also that a plea upon equitable grounds, admitting the making of a mortgage for a certain amount between the defendant and the judgment debtor, but claiming that an agreement that certain sums (when paid as therein mentioned) were to have been allowed on the first instalment (for which this action was brought) did not amount to a variance of a covenant by a parol agreement, and was therefore good.

The declaration stated that the plaintiff as sheriff of the county of Simcoe, under a writ *ven. ex.* for part, and *fi. fa.* for residue, dated 21st June 1859, issued out of the Queen's Bench by R. H. Smith against G. T. Lawrence, was commanded to make £1471, 18s. 2d., and while the said writ was in force seized and took in execution an indenture of mortgage dated 18th July 1859, made between the defendant John Bernie of the first part, Caroline, his wife, of the second part, and the said G. T. Lawrence of the third part, whereby the said defendant covenanted to pay the said Lawrence, on the 18th February 1860, \$946, but did not pay the same, and the plaintiff as sheriff of the county of Simcoe, under and by virtue of the statute in such case, &c., claimed \$1000.

*Pleas*—1. That after the issuing of the writ of *ven. ex.* and *fi. fa.*, &c., as in the declaration mentioned, and before the plaintiff took in execution the said mortgage, Lawrence died, and the said mortgage passed to and became the property of the personal representatives of Lawrence, and was not at the time of the said seizure liable to be taken in execution upon the said writ.

2. On equitable grounds as to \$453.5c., parcel of the first instalment due on the mortgage, and being the moneys mentioned in the declaration, defendant says that before the execution of the mortgage he purchased from Lawrence all

his stock-in-trade as a merchant for \$3236, to be paid thus : \$400 down ; that an account should be taken between Lawrence and defendant, and the balance found due to defendant should be credited on such purchase, and the balance should be paid in three equal instalments on the 18th February 1860, 1861, and 1862, without interest, to be secured to Lawrence by mortgage from defendant on the north part of No. 19, 5th concession Sunnidale; and it was further agreed that defendant should retire at maturity a promissory-note for \$320, dated 2nd June 1859, payable three months after date, which Lawrence had made, and defendant for his accommodation had endorsed, and which was then held by one McMaster, and was current, and that if Lawrence did not retire this note at maturity defendant should assume the payment thereof, and take credit out of the first payment to be made, which was to be secured by the said mortgage. Averment that defendant paid \$400 down, and was ready and willing to take an account with Lawrence, and after deducting the amount found due to himself and the balance of the purchase money of the goods, to execute to Lawrence a mortgage for the residue, but Lawrence neglected so to do, and without taking such account, and deducting, &c., defendant was induced at the urgent entreaty of Lawrence to execute the mortgage for the balance of the purchase money due after payment of the \$400, and did so execute the same upon the express understanding that the amount due by Lawrence to defendant should be allowed out of the first instalment, which is the one now sued for. That Lawrence did not pay the note at maturity, or at any time before or since, or any part thereof, and defendant assumed the payment thereof and arranged the same with McMaster; and defendant averred that there was and is due to him from Lawrence \$122 72c, and that the note and interest up to the time the first instalment became due amounted to \$330 35c, and that plaintiff ought not further to maintain his action for the said sum of \$453 5c.

Issue was taken on both pleas, and plaintiff demurred to the first plea because it did not shew that the writ of execution had not been placed in the plaintiff's hands to be exe-

cuted before the death of Lawrence. That the writ bound all the effects of Lawrence liable to be taken under such a writ from its teste. That the plea did not shew that the personal representatives of Lawrence are purchasers for value, but merely that the mortgage came to them by succession. That the mortgage was liable to be taken in execution under the said writ. He also demurred to the second plea, because it was not averred or shewn that defendant has paid the said note, but the same is still outstanding, and Lawrence, or his personal representatives, are liable thereon. That the plea did not shew that defendant was entitled to a perpetual unqualified and unconditional injunction to restrain an action on the mortgage to recover the amount to which the plea was pleaded. That the plea shewed no fraud or mistake in obtaining the mortgage. That it was not alleged the undertaking mentioned in the plea was in writing, or that there was any agreement at the time of making the mortgage that defendant should not be liable for the payment of the whole mortgage security. That defendant sought to set up an alleged contract or undertaking to vary his deed.

The trial took place at Barrie in May 1860, before *Burns, J.* The agreement respecting the taking the mortgage for the full amount, subject to reduction on an account, and to the allowance of the note if defendant had to pay it, was proved. The deductions for the account were made, and leave was given to defendant to move to deduct further the amount of the note \$320, and the plaintiff had a verdict for £233, 12s. 1d. The note seemed to have been produced at the trial—it was marked filed—but the learned judge's notes did not expressly refer to its production. If defendant had it in his possession he must have paid McMaster. It was distinctly sworn that *before* the execution of the mortgage it was agreed if Lawrence did not pay the note the amount was to be endorsed on the mortgage. Lawrence died on 30th July 1859. The sheriff seized the mortgage three or four weeks afterwards. The note fell due 2nd August 1859.

*McCarthy* for defendant (plaintiff had verdict) supported rule for new trial, and supported pleas against demurrer.

As to first plea it was proved that in fact the mortgage was not seized until after Lawrence's death.

As to second plea it was proved as to the promissory note.

*Ergo* the points on the rule and on the demurrer are the same.

If there were goods and chattels, admitted, the writ would bind from the teste. The statute only authorises the sheriff to seize property of persons named in the execution. *Rankin v. Harwood*, 10 Jur. 794. Goods are only seizable in the hands of the personal representatives, when they are *bound by the writ*. The words of the statute only give an *authority to seize*. 2. The quality of the goods rebuts the idea of their being bound.

1st point on demurrer as to second plea, altering the sealed contract by parol. If Lawrence were suing defendant it would be a gross fraud in him to refuse to allow—*Le Targe v. DeTuyll*, 1 Ch. Rep. 227; *Le Targe v. DeTuyll*, 3 Ch. Rep. 369, 375-6; *Gould v. Hamilton*, 5 Ch. Rep. 192; *Willard v. McNab*, 2 Ch. Rep. 601, all U. C. Ch. Rep.; *Clifford v. Turrill*, 9 Jur. 633—a case of reforming a contract on parol evidence. The sheriff can have no higher right than Lawrence. *Davis v. Hawke*, 4 Grant 408; *Moffatt v. Bank U. C.*, 5 Grant 374.

2nd point, that this defence cannot be raised at law. This court cannot give an entire relief and do complete justice.

The balance due by Lawrence to defendant on settlement of account was not proved at the trial.

*McMichael*. The question on first plea is not as to right of the third parties, but whether the sheriff is authorised to seize it. The question involves no rights but those of the defendant.

2nd plea is really a plea to reform the mortgage, and this court has no such power, and it is setting up a contemporary parol agreement to vary the covenant declared upon. The note was paid by defendant after Lawrence's death to the holder, McMaster.

DRAPER, C. J.—The 20 Vic. ch. 57, sec. 22, enacts that the sheriff having the execution of any *fiery facias* against goods shall seize any money or bank notes (including any

surplus of a former execution against the debtor) and any cheques, bills of exchange, promissory-notes, bonds, mortgages, specialties, or other securities for money belonging to the person against whose effects the *fieri facias* issued, and shall pay or deliver to the party who sued out the execution any money or bank notes so seized, or a sufficient part thereof, and shall hold any such cheques, bills of exchange, promissory-notes, bonds, specialties, or other securities for money, as a security or securities for the amount by the writ and endorsement thereon directed to be levied, or so much thereof as has not otherwise been levied or raised, and such sheriff may sue in his own name for the recovery of the sums secured thereby when the time of payment thereof has arrived. Consol. Stat., U. C., ch. 22, sec. 261. This enactment seems copied from the Imperial Statute, 1 & 2 Vic., ch. 110, sec. 12.

This statute subjects to execution against goods different kinds of property which could not have been seized before, but, except as therein expressed, it leaves the sheriff subject to the same rules in acting under an execution as before. When once it declares that the sheriff shall seize any money, &c., it makes these enumerated things chattels liable to be taken in execution. As to money and bank notes, it would be absurd to speak of selling them; they are already available to satisfy the execution creditor; and as to notes, bills, bonds, specialties, and securities for money, the sheriff is authorised to collect them, though in *Mutton v. Young*, 11 Jur. 444, *Wilde*, C. J., seems to assume that the sheriff should turn them into money as soon as he possibly can, not waiting until they arrive at maturity and can be sued upon. In the report in 4 C. B. 371, he observed, "they are goods and chattels." But the plea is in my opinion bad, so far as the setting up that the mortgage was not liable to be taken on the execution because of Lawrence's death. For if there be a judgment against the testator at the time of his death, the creditor may take his goods in execution in the hands of the executor if the judgment was recovered within a year before his death. *Odes v. Woodward*, 2 Lord Raymond 850; *Waghorne v. Langmead*, 1 Bos. & Pul. 571;

Bragner v. Langmead, 7 T. R. 20; Brocher v. Pond, 2 Dowl. 472, and see Chick v. Smith, 8 Dowl. 337. Here the plea admits that Lawrence died after the issuing of the *ven. ex.* and *fi. fa.* for residue. While it continued in force it might be lawfully executed against his personal property, either in his own hands or those of his personal representatives.

The second plea is confined to a portion of the money sued for, setting up that by an arrangement contemporary with the execution of the instrument, a certain balance or sum to be arrived at by the settlement of some accounts between defendant and Lawrence was to be treated as a payment upon the mortgage, and that the amount of certain promissory notes made by Lawrence in defendant's favour, and endorsed by him for Lawrence's accommodation, should also, if taken up by defendant, be credited on the mortgage. For the plaintiff it is insisted that this is endeavouring to vary the defendant's covenant by a parol agreement, and that this court is in effect called upon to reform the mortgage and introduce new terms and conditions into it. I think, however, we may uphold the plea as admitting the mortgage to be a valid security for the full amount, payable as is therein expressed, by certain instalments at certain times, but as setting up an agreement to take in payment of the first instalment, so far as they will go, two different sums, for which the mortgagee is or may become liable to the mortgagor. In other words, it is as if the mortgagee admitted he owed an unsettled balance to the mortgagor, and was also liable to him as payee of a promissory note not yet due, and which was outstanding in the hands of a third party for value, and agreed, when the balance was struck and the sum due the mortgagor was ascertained, and whenever the mortgagor retired the promissory note, to treat these two sums as payments made on the first instalment of the mortgage. That such an agreement might be made without reforming the mortgage or varying its terms, cannot, I think, be denied, and that it would be a good answer, *pro tanto* (and it is only pleaded *pro tanto*), to a claim for the first instalment seems to me consistent with reason. I am inclined, therefore, to

uphold the second plea, and as a consequence to make the rule absolute for deducting the amount of the note from the verdict.

The present plaintiff can have no other rights than the mortgagee Lawrence, or his representatives would have, and I do not at present see why, if Lawrence did agree to allow these sums as payments on the mortgage, the defendant may not insist upon them, when ascertained and settled, as an answer for as much as they will cover of the instalment of the mortgage money now sued for.

I should further observe that in holding the first plea bad we do not proceed upon the ground that this mortgage was bound by the delivery of the writ to the sheriff, nor do we decide that the sheriff could have sold it instead of bringing an action under the authority of the statute to collect the money secured thereby. I believe both my brother judges are of opinion that the mortgage was not bound before seizure, and though my impression was at first otherwise, I have at last arrived at the same conclusion; but we feel no difficulty in holding that, under the circumstances the sheriff had full authority to seize and sue upon it, notwithstanding the death of Lawrence.

We therefore give judgment for the plaintiff on the first plea, and for the defendant on the second, and make absolute so much of the rule as relates to deducting the amount of the note from the verdict, and discharge the residue of the rule.

Rule accordingly.

See 1 Wm. S. 219 F.; Calvert v. Tomlin, 5 Bing. 1; Tann v. Atkinson, Willess, 427; Heapy v. Parris, 6 T. R. F. 369; Collingridge v. Paxton, 11 C. B. 683; Watts v Jefferyes, 15 Jur. 435; Barrack v. McCulloch, 3 Jur. N. S. 180.

## KERR ET AL. V. FULLARTON ET AL.

*Bond to sheriff—Action by assignees on—Breach—Damages.*

In an action by the assignees of a sheriff against the sureties of one F. for a breach of the condition of a bond that F. should abide and remain within the limits,

*Held* that the measure of damages to which the plaintiffs were entitled by reason of the breach, was the amount for which the debtor was in custody, with interest thereon, notwithstanding the debtor was insolvent, from the time of the arrest until the breach of the condition declared on.

The plaintiffs declared as assignees of the sheriff of Kent, setting out that they recovered a judgment on the 7th of May 1857 against the defendant Fullarton for £2003, 16s. in assumpsit, and thereupon sued out a *ca. sa.* directed to the sheriff of Kent, endorsed to levy £682, 0s. 1d. damages; £3, 16s. costs, with interest from the 7th of May 1857; £2, 2s. 6d. for writs of execution and sheriff's fees, poundage and expenses. That the sheriff arrested the defendant Fullarton, and had him in his custody on the writ, and being so in custody, the sheriff, on the 5th of June 1857, took bail for Fullarton to the limits of the gaol of the county of Kent, and the defendants by their writing obligatory, sealed, &c., acknowledged themselves to be bound to the said sheriff in the sum of £1375, 16s. 6d., subject to a condition that the defendant Fullarton should remain and abide within the limits of the gaol of the county of Kent, and not depart therefrom unless discharged from custody in the said suit by due course of law; and should during all the time he should be upon the limits, subject to such custody, observe and obey all notices, orders, or rules of court touching or concerning the said Fullarton, or his answering interrogatories, or his returning or being remanded into close custody, and would also produce the defendant Fullarton to the sheriff, when they, the defendants, McCollum & Scott, or either of them, shall be required, upon reasonable notice.

*Averment.*—That defendant Fullarton did not remain on the limits, and the bond becoming forfeited and the money therein specified remaining unpaid, the sheriff at the request of the plaintiffs assigned the bond to them, whereby an action hath accrued, &c.

*Pleas.*—1st. *Non est factum.* 2nd. That Fullarton did

remain upon the limits as required by the said condition. 3rd. That at the time of the making of the said bond Fullarton was not confined in the gaol of the county of Kent in the custody of the sheriff, upon the *ca. sa.* in the declaration mentioned.

The case was tried at the last London assizes before *Richards, J.* The escape was proved; but the defendants having proved that in June 1857 the defendant Fullarton had made an assignment for the benefit of his creditors of all his effects, gave some evidence, and offered more, to prove that Fullarton was insolvent. The learned judge rejected this evidence, and ruled that the defendants were liable for the full amount of the plaintiff's recovery against him, with interest, &c.

The jury found for the plaintiff, damages £816.

In Easter Term *Prince, A.*, obtained a rule *nisi* for a new trial, on the ground that the evidence of the insolvency of Fullarton, the execution debtor, ought to have been received in mitigation of damages.

*Beard* shewed cause. He cited *Arden v. Goodacre*, 11 C. B. 371; *Mayne on Damages*, 268; *Callagher v. Strobridge*, Drap. 168; *Stevenson v. Cameron*, 8 T. R. 29; *Kingsmill v. Gardiner*, 1 U. C. Q. B. 223.

DRAPER, C. J.—The bond for the limits is a joint and several obligation entered into by the execution debtor and his sureties; it is a specific contract, having express relation to the ascertained liability of the principal to his creditor, the plaintiff in that action; for the statute requires the penalty of the bond to be double the amount for which the debtor is confined. So long as the debtor is in close custody on the *ca. sa.* the plaintiff has a *quasi* satisfaction for his debt, and cannot proceed against either lands or goods. If the debtor takes the benefit of the limits, his creditors may, under a special provision of the provincial statute, sue out execution against his real or personal property; but notwithstanding this permission the confinement to the limits must still be, in some sort, regarded as a punishment to the debtor, or as a means of compelling satisfaction of the sum

recovered. It must be still considered as of *some advantage* to the creditor, while affording a very considerable mitigation and relief to the debtor, though still subjecting him to the restraint of confining himself within the gaol limits. This relief is to be obtained by a bond with sureties, the condition of which is principally directed to the submitting to such restraint and imprisonment. The contract is founded as to amount upon the established liability of the debtor, and the obligors engage that the execution creditor shall have the restraint and imprisonment of the debtor's person on the limits as a means of coercing payment of the debt due to him, the consideration for this engagement being the release of the debtor from close custody.

By the Common Law Procedure Act 1856 the matter was placed upon this footing:—the debtor was in the sheriff's custody under the *ca. sa.* to be detained *in arctâ et salvâ custodiâ*; for this custody the sheriff at common law was answerable. He might be sued in debt by virtue of the statute Westm. 2 and 1 Richd. 2, if the debtor were seen a moment at large. By this act, re-enacting some former provisions, qualifying or changing others, he was enabled to take a bond with sureties subject to the condition stated in the declaration, and he might require the sureties to justify as to their sufficiency by affidavit to be annexed to the bond. On receipt of the bond with an affidavit of its execution, and when he required it, of the sufficiency of the sureties, the act declares "It shall be lawful for the sheriff to permit and allow the debtor to go *out of close custody* into and upon the goal limits, and so long as such debtor shall remain within the said limits, without departing therefrom, and shall in all other respects observe, fulfil, and keep on his part the condition of the said bond," the sheriff shall not be liable to the execution creditor in any action for the escape of such debtor from gaol. If the sureties became insolvent, the sheriff might retake the debtor into close custody until he gave a bond with new sureties, in the same manner as before. The bond was made assignable by the sheriff to the execution creditor, who might sue thereupon in his own name; but by executing an assignment on the request of the execu-

tion creditor the sheriff was discharged from further responsibility on account of the debtor or his safe custody. The sheriff, therefore, until such assignment, was liable to the execution creditor for the custody of the debtor from the moment the latter was taken in execution, whether in gaol or on the limits, he took such security as he deemed sufficiently responsible for his own indemnity, when he allowed the debtor to go upon the limits, it was his business to watch that the solvency of the sureties continued, which was a sort of duty imposed on him in lieu of that of the continuous custody of the debtor. If the debtor violated the condition, the sheriff became liable and must answer the creditor, unless the latter elected to take an assignment of the bail bond, and his remuneration for this duty and responsibility was the poundage on the execution. It has been said, though I believe no case has turned upon that point, that under the former acts the sheriff might assume the responsibility of allowing an execution debtor the benefit of the limits without taking sureties, and shall not be liable for an escape. I have on one occasion at least, in deference to opinions expressed by some of the judges, rather than from any settled conviction in my own mind, acceded to this view. The question would present itself in a different shape under the language of the Common Law Procedure Act above referred to, but it does not arise in this case, and is not for the present very likely to arise, for the 20 Vic., ch. 57 [ss. 25 & 26], makes different provisions, partially re-enacting those of the 16 V., ch. 175, sec. 7 *et seq.* Under these provisions the bond for the limits is to be further conditioned, that the debtor shall, within thirty days from the delivery thereof to the sheriff, procure it, or any bond that may be substituted for it, to be allowed by a judge of the county court of the county wherein the debtor is confined, and upon such allowance being endorsed by the judge, "the sheriff shall be discharged from all responsibility respecting such debtor," unless he be again committed to the close custody of the sheriff, in due form of law. It seems to be in the option of the sheriff to admit the debtor on the limits before the bond is allowed. There is no provision for renewing the sureties in the event of death or

departure from the province. It is true the 304th sec. of the C. L. P. act remains in force, under which the sheriff, apprehending the sureties have become insufficient to pay the amount sworn to by them, may again arrest the debtor and detain him in close custody till he gives a new bond with sureties; but the sheriff has no longer a motive or inducement to act upon it, and the execution creditor, who in the event of a breach of the condition of the bond has no longer the option of resorting to the sheriff, but must have recourse to the sureties who have been allowed, has no means provided by the act to compel the sheriff to exercise this power. This latter enactment enures almost wholly to the benefit of the sheriff; for to be relieved from close custody the debtor will do his utmost to get sufficient sureties, and on their allowance by the county court judge the sheriff is freed from all care or liability, unless the debtor be recommitted, while he retains the same fees and emoluments on the execution which he had while his responsibility for the safe custody of the debtor lasted until he was discharged, or until, upon an escape, the creditor took an assignment of the bond for the limits.

Having given the sheriff this advantage, it is not to be wondered that the legislature have not adopted and enacted the provisions of the imperial statute, 5 & 6 V., ch. 98, sec. 31, which enacts, that if any debtor in execution shall escape out of legal custody, the sheriff, &c., having the custody of such debtor, shall be liable only to an action upon the case for damages sustained by the person at whose suit such debtor was taken or imprisoned, and shall not be liable to any action of debt in consequence of such escape, and that after the 1st of March 1841 no poundage shall be payable to sheriffs, &c., for taking the body of any person in execution, but there shall be payable to the sheriff, &c., upon every such execution against the body, such fees only as shall be allowed under the sanction and authority of the judges of the courts of common law, pursuant to the statute, &c.

The creditor here, therefore, has the same remedies against the sheriff for an escape that he had in England before the passing of that act, namely, he may sue the sheriff

in debt or in case. And it has always been considered more advantageous to sue in debt, because in that form of action the verdict must be given for the entire demand. The action on the case seems to have been resorted to when it was doubtful whether a caption of the debtor could be proved, and then after charging an escape in case in one count a second might be added charging negligence in not arresting when the sheriff had the opportunity. In the present case the plaintiff could have had no difficulty in establishing the arrest of Fullarton if he had sued the sheriff in debt, and, as I understand the law, he would have had a right to the full amount of his claim against the debtor who had escaped, and as the sheriff on the bond for the limits would be entitled to indemnity, he would recover the like amount from the obligors. *Bonafous v. Walker*, 2 T. R. 129, per Buller, J.; *Hawkins v. Plomer*, 2 W. Bl. 1048. See 1 Saund., 38, n. 2.

It is not very easy to understand why a different rule should govern in an action on the same bond, complaining of the same breach, merely because the plaintiff in the original action has taken an assignment of the bond and sues in his own name as assignee of the sheriff, instead of the sheriff bringing the action himself for indemnity against the claim of the plaintiff, or that there should be a different measure of damages in an action of debt for an escape, or in an action of debt on a bond, conditioned that no such escape shall take place.

If it had been held that a bond for the limits did not come within the stat. 9 & 10 Wm. 3, the question now before us could not have arisen in any case where the plaintiff obtained judgment, either on demurrer by confession or *nil dicit*. And in cases where an issue of fact had to be tried by a jury, the court must, I apprehend, have directed that the right to recover his full debt was, as in an action on a common bail bond, a matter of law, limiting such right, however, so as not to exceed the penalty of the bond.

The contrary assumption has, however, been acted upon for so many years, and has been so generally recognised by the courts, that it must prevail, unless a court of error decides that it is wrong, or the legislature makes a change. Indeed,

in one case in our courts the point was expressly discussed and decided, but if the question were open and analogy were resorted to, much argument might be urged tending to an opposite conclusion. *Campbell v. Lemon*, 1 U. C. O. S. 401.

With regard to common bail bonds to sheriff, it seems the practice at first was to treat them as coming within the same statute, but in *Moody v. Pheasant*, 2 B. & P. 446, it was held otherwise, and has been so held ever since.

Replevin bonds have also been held not to come within the statute. In *Middleton v. Bryan*, 3 M. & S. 155, the breach assigned was, the not making a return of the goods as was awarded upon an avowry in the replevin suit. Judgment by *nil dicit* was signed, and it was objected that there ought to have been a writ of enquiry, but Lord *Ellenborough* said, "The reason why the writ of enquiry was given by the statute was to prevent the necessity of proceedings in a court of equity; but if the court can afford the same relief to a party as upon a bail bond, the same rule of practice seems to apply." The relief spoken of must be to restrain the plaintiff from levying the full amount of the penalty. Bayley, J., and Dampier, J., put the case on the footing that the bond is given for double the value of the goods, *and therefore the actual value is as much ascertained* as the amount of the debt is in an action on a bail bond, that by entering into the replevin bond the surety admits the value, and therefore there can be no necessity for a writ of enquiry to ascertain the value of the goods. The same line of reasoning would not be foreign to an action on a bond to the limits, namely, that the court would restrain the plaintiff from levying more than his judgment, the amount of which being of record was more certainly ascertained than in an action on a bail bond where the affidavit of debt is the guide, or on a replevin bond where the value is ascertained by affidavit, which must precede the issue of the writ.

But conceding that the bond is one that comes within the statute of Wm., and consequently that the plaintiff must, according to circumstances, assign or suggest breaches, it amounts to no more than this, that a jury must try the issue

and assess the damages ; it cannot affect the rule of law by which such damages are to be ascertained.

The contract being, as I have already observed, that the execution creditor shall have the restraint of the debtor's person on the limits as a security for the sum recovered against him, it would seem a reasonable consequence that the measure of damages for a breach of that contract should be the sum for which the debtor is in custody, with interest ; being the same sum for which the sheriff, the obligee, would be liable if sued in debt for the escape, limited always by the penalty in the bond. I confess I cannot see on what ground the bail can claim to be placed in the same situation that the sheriff is, if sued in case for negligence and breach of duty, or why they are to insist that the plaintiff may not exercise the right he has against the sheriff of claiming compensation as a debt against sureties, who by the very nature of a bond acknowledge themselves to be *indebted*, though conditionally, the condition having no reference to the amount.

The law (as noted) has been altered, and the allowance of the sureties operates as a discharge of the sheriff. Otherwise if the bail could claim to give evidence such as was tendered and rejected in this case, no plaintiff would ever take an assignment of a bail-bond to the limits if he might sue the sheriff in debt, and without difficulty get a verdict for the amount of his judgment against the debtor who has escaped. I do not suppose that the legislature when enacting that the allowance of the bond should relieve the sheriff from further liability, meant also to lessen the liability of the bail—an effect that would result, if they could rely on the insolvency of their principal, to mitigate damages, since there could be no recovery in debt or case against the sheriff after the bond was allowed ; and consequently the sheriff's liability in debt would be no argument for a full recovery against the bail. It could scarcely have escaped notice that few debtors are charged in execution until they are, apparently at least, in a state of insolvency. Where judgment was recovered for libel or slander, trespass to the person, *crim. con.*, seduction, &c., execution against the person would be of little or no value in any case where a bond for the limits was given and allowed,

unless the plaintiff could shew the execution debtor had some property or means to satisfy the damages, at least in part. If the wrongdoer were insolvent, he would find a cheap and ready means to discharge himself from custody without troubling the judges.

In the present case the principal is sued jointly with the sureties, the bond being joint as well as several. It is, as far as I recollect, a novel proceeding for a man, situated as he is, to say—It is true I have broken the condition of my bond and have discharged myself from custody, but I am worth nothing, therefore you shall not recover substantial damages from me or my sureties for my breach of contract. And the sureties may hold the same language; nay, may, with the knowledge of their principal's insolvency, have entered into the bond to release him from close custody, indifferent whether he remained in the limits or no; for if his custody was on account of such insolvency of no value to the plaintiff, he will be unable to recover substantial damages against them.

These, and similar considerations, have led me to think that my brother Richards was right in rejecting the evidence tendered, and I should have no difficulty in pronouncing that as my conclusion if I had not been informed that the Court of Queen's Bench have just pronounced a contrary judgment. The court was not unanimous it is true, but there still is the difficulty which opposite decisions in the two courts may create.—*Brown v. Paxton*, 19 U. C. Q. B. 426. I believe the best rule is, where a court of co-ordinate jurisdiction pronounces judgment on any legal question, and the decision may be reviewed in the court of error and appeal, to treat it as binding until the higher tribunal has decided the question. The amount in the present case is sufficiently large to render it probable that whichever way our judgment is given it will be appealed from. This action, however, was instituted before the case in the Queen's Bench was decided, and the plaintiff has not brought his suit in the face of that decision, and may with more reason claim that we should act upon our own opinions of the law. Besides, the bond in that case was given before the C. P. L. Act was passed, and in the present case it is given after that

statute came into force. Our judgment, therefore, does not proceed upon the same identical state of the statute law; and though I have, in forming my opinion, felt compelled to conclusions at variance with those in the case in the Queen's Bench, the judgments of the two courts are not in direct conflict, being founded on different states of the law.

In my opinion this rule should be discharged.

*Per cur.*—Rule discharged.

See *Wardell v. Fermor*, 2 Camp. 285; *Cardozo v. Hardy*, 2 B. Moore, 220; *Murray v. Earl of Stair*, 2 B. & C. 82; *Smith v. Bond*, 10 Bing. 125; *James v. Thomas*, 5 B. & Ad. 40; *Bronscombe v. Scarborough*, 6 Q. B. 13; *S. C.* 8 Jur. 688; *Webb v. James*, 8 M. & W. 645.

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### MERRICK V. L'ESPERANCE.

*Lease—Indorsement of guaranty thereon—Not under seal—Consideration.*

A. by indenture leased from B. certain premises, covenanting to pay certain rents. On the back of the lease was the following memorandum signed by C.—“I do guarantee that the within rents shall be paid by me as they become due, according to the lease, in case or in event that the within named A. does not pay them.” This endorsement was made and signed before the delivery of the lease, and as a part of the same transaction.

*Held* that the lease and the endorsement might be looked at together for the purpose of making out a consideration for the defendant's promise, and that the letting of the premises formed a sufficient consideration.

The writ in this cause was issued on the 29th February 1860, and plaintiff declared:

1st count—that on the 5th March 1859, in consideration that plaintiff, at defendant's request, would let to one Edward L'Esperance certain premises of the plaintiff, to hold as tenant to plaintiff, from the 1st of April then next, for five years, at the rent of £125 per annum, payable half-yearly, defendant promised plaintiff that if the said Edward L'Esperance should not pay the said rent, he, the defendant, would pay the same. Averment that plaintiff did let to Edward L'Esperance on the terms aforesaid, who enjoyed the same under the demise from the 1st of April to the 1st of October, and on that day £62, 10s. for one half-year's rent of the premises became due and payable from him to the plaintiff, and though requested to

do so, he hath not paid the same to the plaintiff, whereof defendant afterwards had notice and was then requested by plaintiff to pay him the same, yet defendant hath not paid the same or any part thereof.

There was also a count setting out the same agreement as being by deed, also a count for money received, and on the account stated plaintiff claimed damages £100.

Defendant pleaded—1. Plea to first count, defendant did not promise.

2. To the special count—that plaintiff did not demise to Edward L'Esperance, nor did Edward L'Esperance hold and enjoy the premises as tenant thereof to the plaintiff, as therein mentioned.

3. As to special counts—that Edward L'Esperance paid the rent therein mentioned before action, and thereby satisfied plaintiff's claim.

4. As to same count—that Edward L'Esperance satisfied plaintiff's claim before action by payment.

5. To residue of declaration—never indebted.

6. To the whole declaration—payment.

7. Set-off.

8. As to the covenant—that it was not his deed.

Issue was joined on all these pleas.

The cause was taken down to trial before the Chief-Justice of this Court at the last spring assizes for the united counties of Lanark and Renfrew.

A copy of the lease from plaintiff to Edward L'Esperance was put in, the terms being the same as those set out in the first count of the declaration. The original lease was mislaid or lost, and the guaranty on the back of it was proven to be as follows:—"I (defendant) of, &c., do guarantee that the within rents shall be paid by me as they become due, according to the lease in case, *or* in the event of the within named (lessee) does not pay them." This was signed by the defendant, and the jury found it was not *sealed*. It did not clearly appear if the lease was executed before the guaranty was written. The weight of evidence seemed to be that the lease was written and executed first, and afterwards the guaranty signed and witnessed, but the lease was not

delivered to plaintiff until the guaranty was signed and witnessed.

The lease was executed in the presence of plaintiff, defendant, and the lessee, and the witnesses,—the guaranty was read over several times to defendant. It was agreed that defendant should guarantee the payment of the rent, and the memorandum was accordingly written and signed before the lease was delivered.

The defendant objected at the trial—

1. That there being no consideration expressed on the face of the guaranty, it was void, not being under seal. The plaintiff contended that the two writings, the lease and guaranty, formed one instrument—that they were connected. For the purposes of the suit the learned judge overruled the objection, but gave leave to the defendant to move to enter a non-suit. The jury found for the plaintiff on the first count and assessed the damages at £38, 7s.

During Easter Term *Deacon* moved to enter a non-suit pursuant to leave reserved.

*A. Prince* shewed cause; referred to *Bell v. Welsh*, 14 Jurist, 432, and *Shaw v. Coughell*, 10 U. C. Q. B. 117, and contended that the court must look at the facts that took place at the time the lease was executed, and it would clearly appear that the consideration for the guaranty was the leasing of the premises to Edward L'Esperance, defendant's son. That the signing of the lease and the guaranty, and the delivery of both to the plaintiff, were all done at the same meeting of the parties, and altogether constituted but one agreement.

*Deacon* in reply contended that the instrument declared on, having been found by the jury not to be under seal, did not imply a consideration, and no consideration being expressed in it, the defendant was not bound by it, under the authority of *Wain v. Warlters*, 5 East. 10, and the subsequent cases confirming it. He referred to *Saunders v. Wakefield*, 4 B. and Ald. 598; *James v. Williams*, 5 B. & Ad. 1109; *Evans v. Robinson*, 16 U. C. Q. B. 169; *Price v. Richardson*, 15 M. & W. 539; *Bentham v. Cooper*,

5 M. & W. 621; Caballero v. Slater, 14 C. B. 300. This last case he considered in favour of the plaintiff.

RICHARDS, J.—There is no justice in the defence set up, and unless we are constrained by the strict rules of law so to do, we ought not to give effect to it. The rule of law laid down in *Wain v. Warlters*, as to the necessity of the consideration for the defendant's promise appearing from the written agreement, seems to be settled and confirmed by subsequent cases. The later cases shew that the surrounding facts at the time the agreement was entered into may be given in evidence to explain the agreement. Taken as an isolated agreement, the document put forward by the plaintiff would fail to show a proper legal consideration for the defendant's promise. But taken in connection with the lease, and being executed and delivered as a part of that agreement, I think the consideration for the promise set out in the declaration sufficiently appears. The case of *Coldham v. Showler*, reported in 3 C. B. 312, is a strong authority for the plaintiff. There the defendant's daughter had entered into an agreement with the plaintiff for the sale of the goodwill, furniture, fixtures, &c., of a house, and the following endorsement was made on the agreement, which had been attested and signed by Amelia Showler and James Coldham in presence of a witness:—

I hereby undertake that my daughter Amelia Showler shall perform all the covenants and conditions named in the annexed agreement, and hold and consider myself responsible for her. Dated this 10th day of October 1845 (the date of the agreement.)

(Signed) JAMES COLDHAM.

Witness W. S. CAFE (the witness to the agreement).

The agreement was declared upon as made by Amelia Showler, the plaintiff, and the defendant; then the particulars are set out as to what Amelia undertook to do as well as the plaintiff, and proceeds—"And by the said agreement the defendant undertook that his daughter Amelia should perform all the covenants and conditions named in the agree-

ment, and thereby declared and considered himself responsible for her;" then the breach by Amelia is shewn, and the failure on the part of defendant to pay. It was objected that the memorandum signed by the defendant was a mere collateral undertaking, and void under the 4th section of the statute of frauds for want of a consideration expressed on the face it. The objection was overruled.

On the argument of the rule *nisi* as reported in 10 Jurist 552, the same objection was raised, and the defendant's counsel contended that the memorandum of the defendant was a distinct agreement, and consequently no sufficient consideration for the promise appeared on its face.

*Maule*, J., observed, "The signature of the defendant applies to all which precedes it. It cannot be understood what the undertaking is without reference to the other part of the agreement."

*Tindal*, C. J., said, "The parties were together at the time when the agreement and undertaking were signed, and both formed the subject of one transaction. It matters not that they were not signed at the same time, nor both written on the same side of the paper."

If the agreement between the plaintiff and the defendant's son had not been under seal, and the plaintiff had declared against the defendant as a party to that agreement, *Coldham v. Showler* would be conclusive in favour of the plaintiff. It therefore becomes necessary to consider whether the agreement between plaintiff and defendant's son, being under seal, and defendant's undertaking, though in writing not under seal, will prevent the plaintiff's recovering in this action under the declaration framed as it now is.

In the case of *Caballero v. Slater*, 14 C. B. 298, the declaration stated that an agreement in writing was made between the plaintiff, one David Thomson, and the defendant, and then sets out the agreement beginning—"Memorandum of agreement made this 19th day of August 1852, between Madame Mary Ann Caballero of the one part, and David Thompson of the other part (the other parts of the agreement stating the letting of the house and furniture, the rent, the agreement to yield up the premises, &c., are fully

set out, and concludes), "and Mr Michael Thring Slater; the defendant, does also agree and undertake to see the rent paid quarterly by the said Thompson, or otherwise does agree to pay the said rent quarterly for the said David Thompson. David Thompson, M. Slater."

Averment that plaintiff let the house, &c., to Thompson, and he became tenant to plaintiff on the terms mentioned in this agreement, and entered into possession, and afterwards three-quarters' rent became due, yet neither Thompson nor defendant had paid.

Defendant demurred, and on the argument his counsel contended that no consideration was stated for defendant's promise, and none could reasonably be implied from the instrument, and further, that it did not appear that plaintiff had anything to do with defendant's becoming a party to the agreement, which on the face of it purported to be made between her and Thompson only, and if so there was no consideration at all. On this *Jervis*, C. J., observes, The consideration plainly is the letting of the premises to Thomson; the plaintiff was not called upon, and

*Jervis*, C. J., in giving judgment, says, "The agreement shows that Slater was a party, and the consideration for his undertaking was the letting of the premises to Thompson."

These two cases, *Coldham v. Showler*, and *Caballero v. Slater*, taken together, I think establish—the former, that where the whole is one transaction it does not matter whether the signature is on one side of the paper or the other, it applies to all that precedes it; and the latter, that the letting of the premises to the lessee forms a sufficient consideration for the defendant's promise.

Then, does the fact that defendant's agreement is not under seal, whilst that part of it which relates to the covenants and agreements of the plaintiff and his lessee is sealed, make any difference as to plaintiff's right to enforce the agreement that defendant had entered into as against him? I think not.

Supposing the memorandum had been written at the foot of the lease, and had contained these introductory words, "in consideration that the plaintiff will execute the foregoing

lease, I do guarantee," &c., and had been signed as it is now, there can be no doubt that the plaintiff could recover on it. I think the cases referred to will warrant us in incorporating the consideration in the lease into the guaranty, the whole being one transaction, and if so the legal effect of what was done on the part of the defendant was to make a contract binding in law on his part to pay the rent.

I therefore think the rule to enter a nonsuit should be discharged.

*Per cur.*—Rule discharged.

GRASETT ET AL. (EXECUTORS) V. HUTCHINSON.

*Guaranty—Common counts.*

H. signed a writing in the following words:—Toronto, 16th December 1858. — Mr Dixon—Please let the bearer, Theodore Billings, what goods he may require, and charge yours, M. HUTCHINSON."

*Held*, 1st., not to amount to a guaranty for goods furnished Billings on the authority of it.

*Draper*, C. J., and *Richards*, J., disagreeing as to the defendant's liability on the common counts, and *Hagarty*, J., delivering no judgment, no decision was given thereon.

The declaration stated that on the 16th December 1855, in consideration that the plaintiff at the request of the defendant would from time to time sell and deliver goods to one Theodore Billings on credit, the defendant guaranteed and promised plaintiffs to be answerable to them for the due payment of the prices of the said goods.

Averment.—That on the 1st of January 1859, and on divers days afterwards, and before the 25th of October 1859, plaintiffs did sell and deliver to said Billings on credit goods which said Billings had occasion for and required of the plaintiff at and for certain reasonable prices, amounting to £60, and although the time for payment had elapsed, and Billings was requested to pay, yet he had not paid—of all which defendant had notice and was requested to pay, but he has not paid.

2nd count—on a promissory note made by Billings, payable to defendant or order, for \$80 at two months, and endorsed by defendant to plaintiff.

Averment of presentment.—Dishonor and notice to defendant. 3rd, the common counts.

*Pleas*—1st. Did not promise, as in first count. To second count, payment of £20, 13s. 7d. into court. To third count, never indebted. Issue on 1st and 3rd *pleas*, and acceptance of the money paid into court on the second plea.

The case was tried at the last Toronto winter assizes before *Burns, J.* It was proved Billings commenced dealing with A. Dixon & Co. in October 1858. A guaranty was required, and the defendant gave the following writing: "Toronto, 16th December 1858.—Mr Dixon—Please let the bearer, Theodore Billings, what goods he may require, and charge yours, M. HUTCHINSON." Afterwards Billings bought goods from time to time till the balance of the account, together with a note, amounted to \$284. Defendant was called upon both before and after this suit was commenced, and then he wanted the plaintiff to take his note for the amount; he knew what the amount was. At the time the guaranty was given Billings owed the plaintiff about £12; there was a pass-book kept. In March 1859 Billings gave his note endorsed by defendant for \$125; that was the amount then due. Then the account went on. The note was settled up by part payment and by the note sued on, the amount of which had been paid into court. The amount now claimed had all accrued since that note was given. The plaintiff never rendered any account to the defendant, but they gave him notice after Billings absconded. When he was sued defendant said he would give his note at three months, but said he did not want to bear expenses.

A nonsuit was moved for, contending the instrument was not a guaranty, but an order for goods in defendant's own name.

That the common count for goods was not proved, as the goods were sold to Billings, and that there was no consideration to support a promise to give a note. The learned judge overruled the objections, and the plaintiffs had a verdict for £50, 14s. 4d.

During this term *McMichael* obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection, on the ground that the instrument in evidence not being a

guaranty did not support the first count in the declaration, or, if a guaranty, it was not a continuing one, and therefore defendant was not chargeable on it after he had settled the amount by endorsing the note of the principal debtor; that there was no evidence to support the common counts, no goods having ever been sold to defendant or to his credit, but all the goods having been sold to Billings and to his credit. An affidavit of defendant's was filed on moving the rule, although it was not referred to in it. The defendant swore that he gave the writing produced at the trial on the representation of Billings that he wanted to get goods to the extent of \$100 or \$120, and with the express understanding between him and Billings that he was not to exceed \$120; that afterwards Billings brought him the note mentioned at the trial, to endorse which he settled and ultimately paid, as mentioned at the trial. That when that note was brought to him he considered the order was satisfied, and had no knowledge that any goods were being given to Billings on that order; that had he known it he would immediately have put a stop to it, and if necessary cancelled the order. That he never heard or suspected the plaintiff had any claim against him on account of goods sold to Billings other than the \$120, until a short time before the commencement of this suit, and after Billings had absconded, when a clerk from plaintiff came and made the claim. He denied any promise to give a note, but said he would take advice, and asked whether, supposing he had to pay it, they would give him time. That no account was ever given to him, nor had he ever seen any bills of the items charged, except the pass-book which Billings had.

In the same term *Harman* shewed cause. He filed an affidavit in reply, stating that the plaintiffs carry on business as executors and executrix of the late Alexander Dixon, under the style of Alexander Dixon & Son. He annexed to his affidavit the promissory note declared on in this cause, and stated that it was the renewal of another note also annexed, which bore date the 8th of March 1859, and was drawn by Billings and payable to defendant at three months for \$125, 12.

*Harman* contended that this was either an order by which the defendant became the principal debtor for all the goods furnished to Billings, or it amounted to an undertaking to pay in case Billings made default, citing *Langdale v. Parry*, 2 D. & R. 337. He contended that it was a continuing guaranty, and referred to *Stewart v. McKean*, 10 Exch. 675; *Stadt v. Lill*, 9 East. 348; *The Trent Navigation Co. v. Harley*, 10 Ea. 34.

*McMichael* did not deny that the instrument, if a guaranty at all, was a continuing guaranty, but he insisted that it was only an order for the sale of goods on the defendant's credit, to be delivered to Billings, but to be charged against himself. That the plaintiffs, if they accepted this order, were bound to act upon it according to its conditions, instead of which they charged Billings with the goods, and the defendant having no account rendered to him, was deprived of the knowledge to what extent goods were obtained by Billings. He referred to *Whitcher v. Hall*, 5 B. & C. 269; *Simpson v. Penton*, 2 C. & M. 430; *Barber v. Fox*, 1 Starkie, 270; *Archer v. Hale*, 4 Bing. 464; *Combe v. Woolf*, 8 Bing. 156; *Watson v. Wharam*, 2 T. R. 80; *Jones v. Cooper*, Cowp. 227.

DRAPER, C. J.—The question raised is whether the instrument upon which the defendant is sought to be charged is simply his own contract to pay for goods sold to himself, though to be delivered to Billings, so that he is the primary debtor, no contract having been entered into with or by Billings, or whether he comes in as a surety, and is to be liable only on the default of Billings, and therefore his (the defendant's) responsibility is of a secondary character.

The defendant contends for the first proposition; and in order to avoid the obvious difficulty, that if he be right he is liable on the count for goods sold and delivered, and that if it were necessary the court would at this or any stage of the cause before judgment allow an additional count to be inserted by way of amendment to the declaration; he insists that the agreement on his part to be liable for goods sold to himself, though delivered to Billings, was that the goods should be *charged* to himself, instead of which they were

entered in a pass-book headed, "Mr. Theodore Billings in account with Alexander Dixon & Son," and were not charged in the plaintiff's books against the defendant himself. I am by no means prepared to yield to this subtlety, or to admit that charging these goods erroneously to Billings, as the primary debtor, will discharge the defendant, who, as he now asserts, was throughout the primary debtor. That the plaintiffs all along looked to the defendant as responsible to them is beyond dispute; that they delivered the goods to the party to whom the defendant desired and intended they should be delivered is proved, and the writing upon the terms of which this argument is built leaves it open to the plaintiffs to charge the defendant with the goods at any time. We may well hold that full effect is given to the word "charge" by the demand made in bringing an action for goods sold and delivered.

I have had much doubt on the question whether this writing amounted to a guaranty. In construing it we are bound to endeavour to ascertain the understanding and meaning of the parties in which we may, and I think should, regard the surrounding circumstances. I have felt much pressed with the language, "let Mr. Billings what goods he may require," as indicating an intention that Billings was primarily liable, and this is confirmed by the defendant's own conduct in endorsing a note upon Billings' representation of what was due, and when the only account rendered was contained in the pass-book between the plaintiffs and Billings. Nevertheless the latter words, "and charge yours," signing his own name, certainly show a direction on the defendant's part that though the goods were to be furnished to Billings they were to be charged against the defendant, thus making him the party on whose credit as principal the goods were sold and delivered. Perhaps this is the soundest conclusion; I understand my brother *Richards* to adopt it, and I have made up my mind to concur with him, and to hold that the defendant is not liable upon this writing as a guaranty for Billings. *Goldshede v. Swan*, 1 Exch. 154; *Bell v. Welch*, 9 C. B. 154, 14 Jur. 432; *Steele v. Hoe*, 14 Q. B. 431; *Keate v. Temple*, 1 B. & P. 158.

But unfortunately for the parties (as my brother *Hagarty* feels precluded from giving any judgment) we are not able to arrive at the same conclusion as to defendant's liability on the common counts. My brother *Richards* will give the reasons on which he thinks the defendant not liable.

The court therefore being equally divided, the application made by Mr. *McMichael* fails.

See *Saunders v. Wakefield*, 4 B. & A. 601, per Bayley, J.; *Price v. Richardson*, 15 M. & W. 539; *Semple v. Pink*, 1 Exch. 74; *Oldershaw v. King*, 2 H. & N. 517; *Morley v. Boothby*, 3 Bing. 107; *White v. Woodward*, 5 C. B. 810; *Russell v. Mosley*, 3 B. & B. 211; *Williams v. Lake*, 6 Jur. N. S. 45; *Holmes v. Mitchell*, ib. 712.

RICHARDS, J.—The words of the document on which this defendant is sought to be made liable are as follows:—“Toronto, 16th of December 1858.—Mr Dixon—Please let the bearer, Theodore Billings, what goods he may require, and charge yours, M. HUTCHINSON.”

The goods delivered were entered in a pass-book, which at the commencement of it was headed between plaintiffs and Billings. There was no further evidence as to how they were entered in the plaintiffs' books, and I think we must assume that those entries correspond with the pass-book. If that be the case, then Billings was the person for whom the goods were furnished, and was primarily liable to the plaintiffs for the payment; at least I should so infer. If there is any doubt as to that fact it should be decided by a jury. The memorandum signed by the defendant does not seem to me to be in the form of a guaranty, but rather an order to deliver goods to Billings for which he (defendant) was to be primarily liable. If the goods were not delivered on this, and defendant charged with them, then they must have been sold on Billings' credit, probably with the intention of making defendant liable to be called on in the *second* instance, as guaranteeing the payment of the goods sold to Billings. The order does not imply such an agreement on the defendant's part, and I think he cannot be held so liable.

Then, will he be liable primarily? That will depend on

the fact whether the credit was given to him as a *principal*, and I have already stated I think it was not so given. If not so given, then in the event of his paying the debt he could not sue Billings for the amount paid. *Simpson v. Penton*, 2 Cro. & Mee. 430, S. C. 4 Tyr 315, seems to me to be strong authority in favour of the defendant on this point. In that case the facts shew that the plaintiff went to a furniture dealer with defendant, and said, "Have you any objection to supply this gentleman (defendant) with some furniture? If you will, I will be answerable for it; I will see it paid at the end of six months." The entry in the books of the seller was, Mr Penton per W. Simpson. The defendant Penton not having paid, the seller called on the plaintiff, who paid the amount, and sued the defendant for money paid to his use. Defendant contended at the trial that the plaintiff's undertaking was only collateral, and as he was not liable under the statute of frauds, his paying the amount was in his own wrong, and he could not therefore recover from the defendant. The jury found the goods were sold to and on the credit of the plaintiff, to be paid by him in the first instance, and gave him a verdict for the amount. On a motion for a nonsuit the court held it was for the jury to decide as to whom the credit was given, and although the defendant might have paid the *seller*, the latter had only a *legal* claim against the plaintiff, which plaintiff having discharged could well sue defendant therefor. It seems to be taken for granted, what I apprehend is the law in this case, that if the plaintiff in that action had not been primarily liable he could not recover against the defendant, and his so being primarily liable repelled any contract on the defendant's part to pay the seller for the goods supplied for him. If, therefore, in the case before us, the party primarily liable was Billings, the plaintiffs having sold the goods to him expecting to hold the defendant liable as a guarantor, then defendant could not be sued for goods sold and delivered, and that portion of the case fails.

As to being liable on the order as guaranteeing a debt contracted or to be contracted by Billings, I have already stated my opinion that the instrument and the surrounding

facts, as far as the defendant had knowledge of or participated in the transaction, do not create a liability on his part as a guarantor.

I think, therefore, under the facts the plaintiff's case fails and if there is any doubt as to the facts the case should go to another jury

HAGARTY, J., gave no judgment, and the court being divided in opinion, the rule fails.

No judgment.

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THOMAS FERRIS V. STEPHEN CHESTERFIELD, ARCHIBALD VIRTUE, AND JOHN H. MORLEY.

*Common School Act—Trustees—Arbitration.*

*Held* that an award made by arbitrators appointed under the 29th section of the common school act (Con. Stats. U. C. 737), against one of the trustees (the secretary-treasurer) in his individual capacity as said trustee, for wrongfully withholding books, monies, &c., is binding.

2nd. That the citing of a trustee to appear before the judge of the county court, under section 130 *et seq.* of school act, is not necessarily a bar to proceeding by arbitration under 29th section.

3rd. That under the 130th clause the judge of the county court has no jurisdiction except when a secretary or treasurer "has in his possession books, moneys, &c., which came into his possession as secretary or treasurer, and which he wrongfully holds and refuses to deliver up," &c., and such secretary-treasurer must be guilty of misdemeanor contemplated by the 130th clause before the judge can interfere.

APPEAL from the county court of the united counties of Northumberland and Durham.

Writ issued on the 1st of April 1858.

Declaration stated that the defendant took and detained the goods and chattels of the plaintiff to the value of £30, whereof the plaintiff complained he was damaged.

*Plea* 1st. Stated that defendant did not take the goods and chattels of plaintiff as alleged.

*Plea* 2nd. That the goods and chattels were not plaintiff's.

*Plea* 3rd. The defendant says that plaintiff and one John Irwin, and one William Irwin, were duly elected trustees of school section No. 16, in the township of Darlington, for the year 1857.

That the annual school meeting was duly held according to law on the 2nd Wednesday of January 1858.

That it was the duty of the trustees to prepare and have read at the annual school meeting a report for the year,

shewing the receipt and expenditure of all moneys for school purposes in the section for the year. That at such school meeting it was the duty of the freeholders, &c., to receive and decide upon such report.

That the school trustees did cause to be prepared and read such report as aforesaid. That the said report was decided not to be satisfactory to a majority of the freeholders, who thereupon appointed one W. H. R., and the said trustees then duly appointed one W. McL., who duly examined the said report, and thereupon on the 19th of February 1858 made their award, and awarded that the said plaintiff was indebted to the said trustees for £33, 2s. 4d., and thereby authorised one A. V., being one of the defendants in this suit, to collect the said sum of money within one month from the date of the said award, and that the said A. V. distrained the goods of the said plaintiff accordingly.

Replication to first and second pleas.

*Demurrer* to the third on the following grounds: that the said third plea was bad in substance, because the corporation of said school section are not properly described therein, and because it was not shewn in what capacity the award therein set forth was made against said plaintiff; nor was it shewn that the said arbitrators had authority to make an award against an individual member of a trustee corporation, and because such arbitration and award are remedies between the freeholders and householders of a school section and the school corporation of such section, and not between said freeholders and householders and a trustee or secretary-treasurer of said section.

And for a second replication to the said third plea of said defendants, the plaintiff says, that on or about the 30th of January 1853 the plaintiff was ordered to appear before the judge of the County Court of the United Counties of Northumberland and Durham, under the provisions of the Upper Canada School Act (Consol. Stats., ch. 64, s. 131) of 1850, to answer certain charges preferred against him as secretary-treasurer of said school section by said J. I. and W. I., trustees as aforesaid, in regard to his alleged indebtedness to said school section, as set out in said supposed

award, and concerning which the said supposed award was made. And that the said judge, after having heard and fully considered the complaint of the said J. I. and W. I., and the evidence and proof adduced in support of said alleged indebtedness, and the allegations of the plaintiff, and the arguments of counsel for both parties, ordered the said plaintiff to be discharged, and decided that the said plaintiff was not in any way indebted to said school section, nor bound to pay over any money, nor to deliver any books, papers, or chattels belonging to said school section; and that the plaintiff was thereby totally discharged and released of and from all liability for and on account of the said school section.

Rejoinder to first replication of plaintiff, and demurrer to 2nd plea, on the following grounds: "Because the proceedings therein alleged to have been had before the county court judge was a proceeding taken by the trustees against the secretary-treasurer, while the averment in the third plea of the defendants is a proceeding between the freeholders and householders of the school section and the trustees; and the proceeding by the trustees against the secretary-treasurer is no bar to the proceeding and award set out in the defendant's plea; and because the said county court judge had no power to decide that the said secretary-treasurer was not indebted as a trustee to the school section or otherwise; and because it is not alleged that the said J. I. and W. I. were, at the time of the said proceeding before the county court judge, trustees of the said school section."

Surrejoinder.

The following was the judgment of the learned judge of the county court:—

The first demurrer which is replied by the plaintiff to the defendant's third plea raises the question whether an arbitration and award as set forth in that plea are authorised by the 29th clause of the Common School Act, Consol. Stats., U. C. 737.

The 21st sub-section of the 27th clause requires the trustees to "cause to be prepared at their annual meeting their annual report," which shall include, among other things, a

full and detailed account of the receipt and expenditure of all school money received and expended on behalf of such section for any purpose whatever during the year. By the 29th clause it is enacted, that in case the account mentioned in the sub-section just recited is not satisfactory to a majority of the freeholders and householders present at the annual meeting, then a majority of the said freeholders and householders shall appoint an arbitrator, and the trustees shall appoint another, and the two arbitrators thus appointed shall examine the said account, and their decision respecting it shall be final, and the sum or sums awarded by them against any person shall be collected by such arbitrators, &c. It is contended on behalf of the plaintiff that an arbitration under this clause is given only as a remedy between the freeholders and householders of a school section on the one part, and the trustees, in their corporate capacity, on the other part, and therefore that the award set forth in the plea, which is against one of the trustees only, and in his individual capacity, is bad. The several cases decided by the superior courts upon arbitrations between a teacher and the trustees are relied upon as supporting this view. There is, however, a marked distinction between these cases and the present one. In their dealings with the teacher the trustees are not principals, but agents only for the section. In this case there is no third party; it is a question as between a trustee and his *cestuique trust*. To present a correct account of moneys entrusted to him is as much a personal obligation on the part of a trustee as of every other person; the law, indeed, is the more jealous of his conduct in this respect because he is a trustee. The fact that the parties in this case have been created a corporation certainly ought not, and in my opinion does not, make any difference. The language of the act clearly contemplates a personal responsibility; and I cannot perceive any objection in principle to an arbitration and award such as are set forth in this plea. It is not denied that the plaintiff, against whom the award was made, was a party to the arbitration, and the fact of his having been secretary and treasurer would account for the award being against him and not the other trustees, who

may reasonably be supposed to have had less actual responsibility. It is true that the 130th and three succeeding clauses of the same statute give a remedy against a secretary-treasurer, but that remedy is of a limited nature, and difficulties may well arise between the school section and the secretary-treasurer which could not be settled by the proceedings contemplated in these clauses. Looking also at the pains obviously taken in the several enactments of the School Act to bring all matters of controversy as much as possible within the remedy of arbitration, I cannot doubt its application in this instance. The clauses last referred to have to be more particularly considered in deciding the other demurrer, and the observations it will be necessary to make on them are applicable in some respects also to this portion of the case.

The second demurrer, which is rejoined by the defendants to the second replication of the plaintiff, raises the question whether a proceeding under the 130th and following clauses is necessarily a bar to a proceeding under the 29th section.

The replication sets forth that the plaintiff was ordered to appear before the judge of the county court, in pursuance of the School Act, to answer a certain charge preferred against him as secretary-treasurer by the other trustees in regard to his alleged indebtedness as set out in the supposed award, and concerning which the said supposed award was made; and that the judge, after having heard and fully considered the complaint, and the evidence and proof adduced in support of said alleged indebtedness, and the allegations of the other trustees and the argument of counsel for both parties, ordered the plaintiff to be discharged, &c.

If the jurisdiction given to the county judge were co-extensive with the powers given to the arbitrators under the 21st clause of the act, and it was shown that the matter brought before him was identical with that disposed of by the arbitrators, then this replication would, I think, be a sufficient answer to the plea, although the parties using the remedy may not have been identical.

The identity of the matter investigated by the county judge with that decided by the arbitrators is probably sufficiently alleged in the replication. The charge against him

is stated to be "in regard to his alleged indebtedness as set out in the award, and concerning which the award was made." But the question then arises, is the *jurisdiction* of the county judge co-extensive with the power of the arbitrators, so that the decision made by him would necessarily cover the whole matter of controversy left to arbitration? The 130th clause, the first of the penal clauses, enacts that if "any secretary-treasurer has in his possession any books, papers, chattels, or moneys which came into his possession as secretary-treasurer, and wrongfully withholds or refuses to deliver up, or to account for, or pay over the same or any part thereof to the person and in the manner directed by a majority of the school trustees then in office, such withholding, &c., shall be a misdemeanor." Under the next clause, the county judge, upon application by a majority of the trustees, shall order the secretary-treasurer to appear before him; and by the 133d clause, at the time and place appointed, the judge shall in a summary manner hear the complaint, and if he is of opinion that it is well founded he shall "order the party to deliver up, account for, and pay over the books, papers, chattels, moneys as aforesaid." Under these provisions of the act it is quite clear that the judge has no jurisdiction except where a secretary-treasurer "has in his possession books, money, &c., which come into his possession as secretary-treasurer, and which he wrongfully withholds or refuses to deliver up or account for and pay over to the person and in the manner directed by a majority of the school trustees." He must, in fact, have been guilty of the misdemeanor contemplated by the 130th clause before the judge could be required to interfere. It is certainly possible, however, that a secretary-treasurer of a school section may be found to be indebted to the section otherwise than for money which came into his possession which he wrongfully withholds or refuses to account for and pay over; he may be liable for some neglect, and in many ways disputes may arise respecting his accounts which would be the fair subject of an arbitration, and over which the summary power given to the county judge could exercise no control. I know nothing of this case except from the pleadings. The pro-

ceedings alluded to were not had before me ; it may have been possible, however, that they were taken for the purpose of enforcing the award. Supposing that to have been the case, then all that is said in the replication with reference to this subject-matter of the complaint would be true, but the judge would not have been justified in such a case in interfering. The mode of collecting money due on the award is specifically pointed out in the act, and the neglecting to pay the money awarded would clearly not come within the meaning of the 130th clause of the school act.

It is true, however, on the other hand, that the matter decided by the arbitrators might in this case have been one over which the county judge had jurisdiction, but as in the view I take of the statute his jurisdiction is a limited one—not co-extensive as respects the subject of enquiry with the power given to arbitrators—the replication should have shewn in specific terms that the charge brought before the judge and the matters decided by the arbitrators were not only identical, but that the county judge had competent jurisdiction respecting them, and this I think it utterly fails to do.—*Kennedy v. Burness*, 15 Q. B. U. C. 488, and the cases there cited by the C. J., viz., *Moravia v. Sloper et al.*, Willes, 30; *Moore v. Kay*, 4 Taunt. 34. I am of opinion, therefore, that the proceeding before the county judge, as stated in the replication, does not form a legal answer to the arbitration, award, and subsequent distress for the sum awarded, and therefore that on the whole pleadings judgment must be for the defendants.

This judgment was appealed to this court on the following grounds :—

Grounds of Appeal—1st. That on the grounds set forth as causes of demurrer, and the third plea of the defendants, the said judge should have given judgment in favour of the plaintiff.

2. That the said judge ought to have given judgment in favour of the second replication of the plaintiff, notwithstanding the grounds of demurrer alleged by the defendants to said replication.

*Cameron*, Q. C., for appellant.

*Harrison, R. A.*, for respondent.

The following cases were cited, Consol. Stats. 732 ; Forbes v. School Trustees of Plympton, 8 C. P. U. C. 74 ; Kennedy v. Burness, 11 U. C. Q. B. 473 ; Kennedy v. Hall, 7 U. C. C. P. 218 ; Ranney v. Macklem, 9 U. C. C. P. 292 ; Place v. Potts, 24 L. J. Exch. 225.

DRAPER, C. J.—It is not always easy to arrive at the true meaning and intention of the legislature in the various provisions of the school acts, for they are not always framed with precision sufficient to avoid an apparent inconsistency between different parts of them ; and one of those difficulties has been raised here in the second demurrer.

But I think the learned judge of the county court has rightly construed the provisions brought under his consideration ; and I am therefore of opinion this appeal should be dismissed with costs.

*Per cur.*—Appeal dismissed with costs.

## ROBSON V. THE BUFFALO AND LAKE HURON RAILROAD CO.

*Issues in fact—Reservation of damages for the court—Question of material or nominal damages.*

Where issues in fact were left to a jury, reserving the question of nominal or substantial damages for the opinion of the court,

*Held* that the only question for the court was whether the plaintiff should be limited to nominal damages or recover the actual value of his goods. The question of mitigating the damages upon the facts proved could not be considered.

At the trial of the issues in fact in this case before *McLean, J.*, at Goderich in November last, the only matters of fact were, 1st, whether the plaintiffs had delivered the goods in question to be carried by the defendants, as alleged in the declaration. 2nd. Whether the defendants had in effect fulfilled their contract to carry these goods from Buffalo to Goderich ; and 3rd, Whether the third plea which had been demurred to was true in fact.

The jury found for the plaintiffs on the first and second issues, and for the defendants on the third, with power reserved to the court to enter a verdict for the plaintiffs on

this plea also, with nominal damages or such other damages as the plaintiffs were in the opinion of the court entitled to recover, the same damages being considered as assessed on the demurrer.

In Michaelmas Term *Richards*, Q. C., obtained a rule *nisi* accordingly, to which

During Hilary Term, *C. Robinson* shewed cause.

DRAPER, C. J.—In the opinion of this court the third plea constituted no defence in law, and we have so determined ; the plaintiffs are consequently entitled to enter their judgment on the whole record, this demurrer being decided in their favour, and the only remaining issues, the first and second, which constituted, if true, a defence, being found by the jury against the defendants, there seems to us no sufficient grounds, and certainly no necessity, for altering the finding of the jury upon the facts contained in this plea. The plaintiffs might have relied on the demurrer without putting the facts in issue, and as they have done so unnecessarily, I think they ought to pay the costs of that finding.

As to damages, so far as we are concerned, we can only determine the question between nominal damages and damages for the value of the goods. We cannot enter into the consideration of mitigating the damages upon the facts proved. Upon the first and second pleas I think there can be no doubt that the plaintiffs have a right to substantial damages, and to the same damages on the assessment on the demurrer, and having no other measure than the value of the goods, I think the verdict should be for that amount.

In considering the evidence given, I cannot to this moment rightly understand how all this delay, difficulty, and litigation should have taken place if there had been a disposition to remove instead of to create or exaggerate obstacles. The goods, it is plain, arrived within a reasonable time at Stratford. There the defendants say the custom-house officers intervened, and rendered it impossible for the defendants to perform their undertaking without the plaintiffs entered the goods themselves and paid the duties, or gave the de-

fendants the information, &c., necessary to enable them to do so. So the goods have remained, and still remain, at Stratford while this vexatious litigation is carried on; and further, we are given to understand the plaintiffs have actually made the requisite entry at Goderich and paid the duties, and claim to recover those duties as an additional damage, and we are told that the custom-house officers at Stratford will not part with the goods, although the duties are paid, for want of production to them of some duplicate of the entry, or other document which the plaintiffs have in their possession but have not forwarded.

I think this last circumstance a sufficient reason why, as the matter is referred to our discretion, we should not add the amount of duties to the value of the goods, independently of any other consideration.

But while I think, as a matter of law, that the plaintiff is entitled to recover the price of his goods, I am very reluctant to allow them to get that from the defendants, and at the same time to withhold from them the official documents necessary to enable them to obtain the goods from the custom-house at Stratford. Unless, therefore, the plaintiffs' counsel is willing to undertake for the delivery over by the plaintiffs to the defendants of all papers, entries, or custom-house documents in their possession or under their control, on payment of whatever sum the plaintiffs have paid to the custom-house officer at Goderich in respect of these goods, I am willing to withhold the giving of any judgment on the present application. But if that undertaking be given, or if the plaintiffs' counsel cannot give it, if the thing itself be performed, then in my opinion the plaintiffs should have judgment on the whole record for the sum of \$134, 55, and \$18, the amount of duties paid, and costs.

June 16th, 1860. We regret that our proposal has proved useless, and we therefore make the rule absolute as above.

*Per cur.*—Rule absolute.

## THE BANK OF TORONTO V. ECCLES ET AL.

*Assignment for benefit of creditors—Consideration—Trusts—Registry.*

A. on the 4th of January 1858 executed a deed of his real estate, purporting to convey it absolutely to the defendants in consideration of five shillings; this deed was not executed by the defendants, and was registered on the 6th January 1858.

On the 5th January 1858 A. executed a deed of assignment for the benefit of creditors generally, which deed was executed by the defendants and other creditors of the assignor, but was not registered, and in the latter deed the trusts, on which the real estate was conveyed by the former one to the defendants, were fully declared.

*Held*, the conveyance being impeached on the ground of fraud, that it was competent to those upholding a transaction such as this, to show the existence of considerations other than the five shillings expressed in the deed, although the common words "and for other considerations" be omitted.

*Held* also that a clause of release did not, in a deed like this, render the deed fraudulent and void.

EJECTMENT writ issued the 12th of March 1859.

This case was tried at the Toronto Assizes on the 13th of January 1860, before *Burns, J.*, and it was admitted by the defendants that John L. Ranney was the owner of the lands in question on the 4th of January 1858, except for the conveyance made by him to the defendants on that and on subsequent days; that the plaintiffs on the 8th of January 1858 recovered judgment against Ranney and James Oswald for £6133, 19s. 4d., which judgment was registered in Lincoln on the 9th of January 1858; that a writ of *feri facias* against goods and chattels was issued on the 8th of January 1858 to the sheriff of Lincoln, and was returned *nulla bona*, and that on the 31st day of January 1858 a writ of *feri facias* against lands was issued to the same sheriff, under which the lands in question were sold to the plaintiffs on the 15th of February 1859, and the sheriff's deed to the plaintiffs was executed on the 5th of March 1859, which was also admitted by defendants.

On the defence the defendants put in a deed from John L. Ranney and wife to them, dated the 4th of January 1858, conveying (amongst other lands) the lands in question. This was an absolute deed; the execution of it was admitted by the plaintiffs. It was not signed by the defendants, or any of them.

The defendants then put in another deed, dated the 5th

of January 1858, between the same parties, passing certain personal property, and declaring the trust of the goods and chattels and the lands in trust to pay the creditors of Ranney.

This deed contained a release in full by his creditors to Ranney of their debts, and was signed by all the defendants and by the creditors of Ranney, and the execution thereof was admitted by the plaintiffs.

The defendants then called Mr Ranney, who swore that he was the granter named in the said deeds. It was proposed to ask him as to the consideration for which the deed of the lands was made by him to the defendants. It was objected by the plaintiffs' counsel that such consideration could not be proved by parol testimony. The judge thought the objection fatal, but received the evidence for the purposes of the trial, in order that the whole matter might come before the court. Mr Ranney stated that the object of the conveyance of the 4th of January 1858, for the consideration of 5s., was for the purpose of transferring his lands for his creditors; one of the creditors, Mr Merritt, was also one of the assignees at the time of the execution of the deeds; he also recognised the signature of persons, creditors, and agents of creditors, and that the signatures were the signatures of the parties purporting to execute; that he had communication with those banks (before executing the deeds) who have executed the deed of the 5th of January, and a composition of 10s. in the pound was agreed upon, and in consequence of a disagreement between him and them as to the value of his land, the composition was abandoned, and he told Mr Barwick, the agent for the Bank of Upper Canada, that he would make an assignment, to which Mr Barwick replied, "Well, make it." The trustees have acted in the trusts, and have sold real and personal property to the amount of £7,000 or £8,000. The only creditors who have refused to come in are the plaintiffs. Upon his cross-examination Mr Ranney stated that he could not recollect the amount of the preferential claims in the assignment, and it was admitted by the defendants' counsel that it was supposed to be about £2,000, but in con-

sequence of some loss upon flour sent to England it would be about £4,000. That he could not recollect precisely the time the creditors signed the deed; that he thought the amount he owed Mr Merritt was about £400; that he was aware the plaintiffs' execution would come in in a few days; therefore that he did hurry to execute the deeds to prevent the plaintiffs from gaining a priority, but that he could not tell why the two deeds were not executed at the same time, unless it was, as he supposed, that the trust-deed was not ready when the short deed was prepared and executed; that he gave written instructions to Mr Miller, his solicitor, and one of the trustees, to prepare the deeds. The witness recognised the paper produced (one of the assignments) as the document, and stated that he gave no other instructions as to the preferential creditors than contained in that paper, and told Mr Miller that he wanted those named to be preferred; that the trust-deed was prepared from this. He thought that he had no conversation with the other trustees in respect of the matter, further than to ask them to be his trustees. The deed of the 5th of January was the only deed expressing any trusts in regard to any of the property. That he spoke to some of his creditors before making his assignment. The plaintiffs all the time stood aloof and would not come in. Another paper was then produced and shewn to the witness, which he recognised as a list of his liabilities when the deed was executed. He was not sure that Mr Merritt signed the deed at the same time he did, but thought he did, as he was present at the time he (witness) executed it. It was then objected on the part of the plaintiffs—

1st. That the first deed being a deed to the trustees as joint tenants (in their private capacity as individuals), and to the survivors and survivor of them, and the heirs of the survivor, and the second deed, giving power to them, their executors and administrators, to sell the lands, &c., the two deeds therefore could not by possibility be connected by any evidence or otherwise; for that an estate was conveyed by the first deed which could not be controlled by the second.

2nd. That by the evidence of Ranney and the instructions by him put in, it was evident that there were two trusts in the deed of the 5th of January not mentioned in the instructions.

3rd. That the deed of the 5th of January contained an absolute release by creditors who signed the same, and that they who do not sign shall not receive dividends, and that all the creditors are to come in within thirty days or be excluded.

4th. That the deed of assignment has not been registered in any county of Upper Canada. It was admitted and conceded by both sides that Ranney had made his assignment *bona fide* for the benefit of his creditors, but the plaintiffs contended that the legal effect of all that was done was fraudulent *quoad* the plaintiffs' execution.

The learned judge expressed his opinion that the assignment was void as against the plaintiffs in consequence of the absolute release contained in the deed of assignment; and it was then agreed that a verdict should be entered for the plaintiffs, subject to the opinion of the court, with power to the parties to turn the case into a special verdict, or special case, or that if the court should so order it, for the opinion of the court of appeal, or otherwise. The question therefore for the opinion of the court was, whether upon all or any of the grounds above stated the deed or deeds of assignment, or either of them, was void as against the plaintiffs' judgment and execution? If in the affirmative the verdict was to stand; if in the negative the verdict was to be entered for the defendants.

*J. H. Cameron, Q. C., and Eccles, Q. C., for plaintiffs.* Deed of the 4th of January, being a voluntary conveyance, no further evidence can be received in support of it.—Owen v. Body, 5 A. & E. 28; Twyné's case, 1 Smith's L. C. 9 and 13, where all authorities are referred to; Fraser v. Sutherland, 2 Grant, 442; Burritt v. Robertson, 18 U. C. Q. B. 555; Wilson v. Kerr, 17 U. C. Q. B. 168; McDonell v. Putnam, 7 Grant, 395; Peacock v. Monk, 1 Ves. Sr. 127;

Filmer v. Gott, 4 Brown's P. C. 230; Rex v. Scammonden, 3 Term R. 474.

*Galt*, Q. C., for defendants, cited Towsley v. Smith, 12 U. C. 555; Thirkell v. Paterson, 18 U. C. Q. B. 75.

*M. C. Cameron*, on same side, cited Ambrose v. Ambrose, 1 P. W. 321; Moorecroft v. Dowding, 2 P. Wms. 514; Deg v. Deg, 2 P. W. 412; Harland v. Binks, 15 Q. B. 713, cited as shewing the deed was not voluntary; Siggers v. Evans, 5 E. & B. 367; Eastwick v. Callaud, 5 T. R. 420; Wood v. Dixie, 7 Q. B. 892; Perrin v. Davis, 5 C. P. U. C. 147.

HAGARTY, J.—We have to consider the effect of a clause of release in a deed of assignment for creditors made previous to the late act of 1858, 22 Vic., ch. 96. I am not aware of any express decisions of either of the courts of law in this province on this point, but in the argument we were referred to the case of McDonell v. Putnam, recently decided by V. C. *Esten* (7 Grant, 395), in which he held that such a provision rendered the deed void. Opinions have been expressed by several of the judges in cases not necessarily requiring the decision of this point. In *Wilson v. Kerr*, 17 U. C. 168, the learned Chief Justice of the Queen's Bench expressed an opinion against the validity of such a clause, but the case was decided on other grounds, and in the Court of Appeal this point was not in judgment.

In *Maulson v. Topping*, 17 U. C. 183, the point was again raised as one of several objections to the assignment. The learned Chief Justice again expresses an opinion adverse to the release clause, but deciding against the assignment on other grounds, adds—"However we might determine this upon fuller discussion in any case which turned exclusively upon that question, we think it clear that in this case the execution was entitled to prevail," &c.

Mr. Justice *Burns* takes the same view.

In a case in the same court last term, *Burritt v. Robertson* (18 U. C. Q. B. 555), where the assignment was since the late act, the Chief Justice expresses his opinion that the

question of release before the act (as in this case) is still an undecided point.

We all know that for the last twenty-five years such assignments with release clauses have been in frequent use in this province. Very extensive properties, real and personal, have been sold by assignees under such assignments, and although they have been frequently impeached in courts of law on various grounds, including on many occasions the objections suggested by the statute 13 Eliz., ch. 5, I am not aware of the release clause being expressly attacked till a very recent date.

The widest latitude has certainly been allowed to debtors assigning their property for payment of debts in attaching conditions and stipulating for advantages. In a case of *Taylor v. Whittemore*, 10 U. C. 440, the assignment contained a release, but although many exceptions were taken that point was not raised. The elaborate judgment of the court of Queen's Bench, pronounced by *Burns, J.*, contains much learning on the subject of assignments. He quotes the language of *Rolfe, B.*, in *Eveleigh v. Purssor*, 2 M. & Rob. 539.

"In one sense it may be considered fraudulent for a man to prefer one of his creditors to the rest and give him security, which left his other creditors unprovided for, but that is not the sense in which (except in cases of bankruptcy) the law understands the term fraudulent. The law leaves it open to the debtor to make his own arrangements with his several creditors, and to pay them in such order as he thinks proper. What is meant by an instrument of this kind being fraudulent is, that the parties never intended it to have operation as a real instrument according to its apparent character and effect."

*Burns, J.*, adds :—"The debtor provides that the property shall all be appropriated among his creditors, but to be paid in the proportion he selects, and he chooses to pay some to a larger extent than others. The law allows this, and so long as we have no law providing for an equal distribution, I know of no rule which prohibits those who are not traders from so dealing with their property, and there is no distinc-

tion in this country between traders and those who are not traders.

"The true criterion is, whether the defendant has given up all his property to his creditors and reserved nothing to himself, and that is the meaning of the expression we see in the cases of the property being given up to be fairly distributed among the creditors, without meaning that there must be an equal distribution."

It may be noted that the learned judge was pressed at the trial to leave it to the jury as a question for them to say whether under the facts the deed was or was not fraudulent, and his declining so to do was urged in term as a misdirection, but the court upheld the direction.

"I left it to them to say whether the deed and the taking possession under it was only a sham to cover the matter for the assignor, or whether there was an intention to carry out the provisions of the deed *bona fide* for the creditors, and if the jury were of the latter opinion, then, believing the deed did not disclose anything *fraudulent upon the face of it*, I did not see how the transaction should be avoided."

Although the release clause was not pressed upon the court, its existence is more than once alluded to in the judgment.

"The deed here would, I think, render the trustees purchasers of the property for a valuable consideration. They are creditors of the debtor, *and they release the liability* of the assignor, and in lieu thereof accept his property, and bind themselves by covenants to perform certain trusts to the other creditors in regard to that property, who in consideration of that release their demands against the assignor, so that whatever may now become of the property the debtor is released from all legal liability to the creditors, who have accepted the goods and effects upon certain conditions which the trustees are to perform. \* \* \* In this case the deed does contain the release to assignor of his liability. I assume there may be a transfer for valuable consideration which would be analogous to a sale," &c.

I have noticed this case at some length to illustrate the manner in which such assignments have been dealt with and

commented on by our courts. Many other cases may be noticed in our courts in which remarks favourable to a debtor's right to prefer particular creditors and to make his own terms may be found. I may mention *Farish v. McKay*, 5 U. C. Q. B. 465; *Anderson v. Gamble*, 8 U. C. Q. B. 440; *Balkwell v. Beddome*, 16 U. C. Q. B. 206; *Taylor v. Commercial Bank*, 4 C. P. 447.

In *Brunskill v. Metcalf*, 3 C. P. 143, it was attempted to resist the plaintiff's claim by setting up an agreement for a deed of assignment, afterwards executed, but not signed by the plaintiff in trust for creditors, containing a full release to assignors.

The late Chief Justice Sir J. *Macaulay* says—"However I regret the disappointment to defendants in an expected composition and final and full discharge, I do not think the evidence goes far enough to hold the plaintiff to it. The assignment would most likely be unimpeachable as void against the non-executing creditors; and if by refraining from coming in under it they have lost recourse against the assets assigned or the benefit of the arrangement, it is their own fault if they had notice and declined advisedly."

The English cases are not very clear on this point. The only express decision that I have seen is *Rex v. Watson*, 3 Price, 6. There the insolvent assigned all his estate to trustees for creditors, stipulating expressly for a release. Counsel pressed on the court that the deed was void under 13 Eliz., and the more strongly "as there was a condition imposed on all who should entitle themselves to benefit by signing it that they should release the debtor from the rest of their demand in consideration of such dividend as they should receive." *Per curiam*.—"There is certainly no fraud in this case affecting the assignment, which has been made for the equal benefit of all the creditors. \* \* \* This is a very common arrangement, which it would be very injurious to disturb where there has been no commission of bankruptcy."

I do not find this case questioned or overruled in England. An American court has spoken of it thus—"The case is a very bald one, and is entitled to very little weight or authority." *Grover v. Wakeman*, 11 Wendell, 187.

In 1820 the case of *Goss v. Neale*, 5 Moore, 19, was tried before C. J. *Abbott*. There was a deed executed by Mr Wellesley in Calais, assigning certain chattels in England to trustees for the benefit of certain of his creditors, for the term of four years. At the expiration of two years, or sooner, if Wellesley should direct, the trustees should sell and pay the creditors in schedule annexed. There was a covenant by the creditors that Wellesley until June 1822 might have license, &c., and that they would not molest him for two years from date of deed. His lordship was of opinion that the deed was valid, and nonsuited plaintiff, an execution creditor. A new trial was moved for on 13 Eliz., and all these points, including the covenant not to molest, were urged. The court refused a rule, holding that it could not be inferred that the transaction was fraudulent in itself or the deed executed without consideration, &c. That the case did not differ from a common mortgage between A. and B., to which C. was no party.

In *Smith v. Hurst*, 17 Jurist, 30, *Turner*, V. C., says—“Subject of course to the statutory rights as to bankruptcy, &c., every debtor has, as I apprehend, according to the law of this country, a perfect right to deal with his property in any mode which he may think best, provided he acts honestly in the disposal of it. He may dispose of it in favour of all or any one or more of his creditors, and the law does not, so far as I am aware, interfere with his power and right to do so, if it be exercised *bona fide*.” The case of *Janes v. Whitbread*, 11 C. B. 406, was that of any assignment in trust for creditors which contained a release to the assignor, the deed was objected to as coming within the principle of *Owen v. Body*, 5 A. & E. 28, and containing terms as to carrying on the trade, &c. The eminent counsel for defendant did not specifically object to the release clause, nor is it alluded to in the judgment. Large powers were given to the trustees as to winding up the estate, employing the assignor, allowing him to retain furniture to the amount of £20, and to arrange at their discretion with creditors under £20, &c. After the verdict establishing the *bona fides* of the deed, it was moved against as invalid at common law and under 13 Eliz.

*Jervis*, C. J., says—"Unless every deed of assignment for the benefit of creditors is to be held void, I think, for the reasons given by my brother *Maule*, that this deed is not void, and that we are well justified in holding the case not to be governed by *Owen v. Body*."

It naturally strikes one as most singular that if a release to assignor be a fatal objection to such a deed, no such point seems to have suggested itself either to bar or bench in the course of a very painstaking discussion.

Many expressions relative to creditors' deeds containing releases are scattered through the book; I do not anywhere find them spoken of as invalid. As an example, in *Jones v. Jones*, 8 M. & W. 438, the question was whether the creditor assignee, and trustee for himself and other creditors, and to whom assignor endorsed a bill of lading as such assignee, held it for value.

*Alderson*, B., and *Parke*, B., remark that they think he would be endorsee of the bill for value "if the deed of assignment contained a release to the assignor."

*Coates v. Williams*, 7 Ex. 205, a deed of assignment for creditors was also in question. It is not stated that it contained a release, but several clauses are mentioned as to winding up the business, employing assignor, allowing him furniture to the amount of £20, &c., as in *Janes v. Whitbread*. The verdict was moved against on the authority of *Owen v. Body*, but the court considered it supported by *Janes v. Whitbread*.

*Pollock*, C. B., says—"There is a decision of the Common Pleas, viz., *Janes v. Whitbread*, in point, for the deed there was in precisely the same terms as the present one, and, as my brother *Martin* observes, is 'a stereotyped deed to be had at any law stationers in London.'"

Either, therefore, the deed did contain the release clause, or its absence was considered too unimportant to attract any attention. If the "stereotyped form" contains the release clause, it is a tolerably strong ground for asserting a general acquiescence in its validity.

In the American courts the decisions are express but conflicting. *Grover v. Wakeman*, already cited; *Howell v.*

Edgar, 3 Scam. 417; Ramsdell v. Sigerson, 2 Gilman, 78; Seaving v. Brinkerhoff, 5 Johnson C. C. 329, and others, may be referred to.

Two eminent jurists, Kent and Story, have pronounced their opinion on the state of the law on this head. The former thus sums up his examination of the question: "The weight of general authority, both English and American, is that an assignment by a debtor of all his property for the payment of his debts, and at the same time giving preferences, and requiring an absolute release from each creditor who accedes, is not *per se* fraudulent and void.

In Story's Equity Jurisprudence, vol. 2, sec. 1036, it says—"Even a stipulation on the part of the debtor in such an assignment, that the creditors taking under it shall release and discharge him from all their further claims beyond the property assigned, will (it seems) be valid and binding on such creditors."

The same very learned personage, speaking judicially in Halsey v. Whitney, 4 Mason 227, says—"A far more difficult question is whether a debtor can rightfully stipulate for a release from his creditors as the conditions of yielding up his property to them." The objection has struck me with great force, and I have paused upon it with no small hesitation of opinion. After reviewing the cases he continues, "When we take into consideration the great length of time during which stipulations of this nature have prevailed in this state (Massachusetts) without objection, there is much reason to believe that the profession have deemed the law settled in favour of the debtor on this point. \* \* There is a case in England directly in point (Rex v. Watson, 3 Price 6), where the very exception was taken by counsel, and the assignment was held good by the Court of Exchequer against the claim of the Crown itself. I am free to say that if these questions were entirely new, and many estates had not passed upon the faith of such assignments, the strong inclination of my mind would be against the validity of them. As it is, I yield without reluctance to what seems the tone of authority in favour of them."

Had we been called on in the absence of all authority to

decide on the validity of such a clause under the 13 Eliz., I should at once arrive at the conclusion that a debtor had no right to impose such a condition on his creditors, and that the case was clearly within the statute 13 Eliz., ch. 5. An examination of the authorities leaves me no alternative, however, but to decide that its presence does not invalidate the assignment before us.

It should be observed here that the assignment purports to convey all Ranney's estate, real and personal; that the dividends accruing to any non-executing creditors shall be applied, not to the use of the assignor, but towards payment of the executing creditors. It is only after full payment of the latter class that the surplus, if any, is to revert to the assignor, so that the whole estate goes to the creditors assenting to the deed.

I also refer to *Riches v. Evans*, 9 C. & P. 640; *Jackson v. Lomax*, 4 T. R. 166. There is also a class of cases on composition deeds under the "six-sevenths" clauses of the Bankrupt Law. *Larpent v. Bibby*, 5 House of Lords, 481; *Irving v. Gray*, 3 H. & N. 34; *Bloomer v. Darke*, 2 C. B. N. S. 171; *March v. Warwick*, 1 H. & N. 158.

I have now to notice the point urged as to the manner in which the real estate purports to have been conveyed in this case. On the 4th of January 1858 Ranney executed a deed of his real estate purporting to be absolute in fee to the defendants, in consideration of 5s. The lands in question in this action are comprised in this deed, which was registered on the 6th of January 1858. The defendants did not execute this deed. This assignment for creditors was executed on the 5th of January 1858, and fully declares the trust on which the lands are held, and is executed by the defendants and many others, creditors. This latter instrument has never been recorded in the county registry.

I am of opinion that in this case, where the conveyance is impeached on the ground of fraud, it is competent to those upholding the transaction to shew the existence of considerations other than the 5s. expressed in the deed, although the common words, and "for other considerations," be omitted.

The case of *Peacock v. Monk*, 1 Vesey sen. 127, decided by Lord *Hardwicke*, relied on by Mr *Cameron*, seems much modified by *Clifford v. Turrill*, 9 Jurist 633, in which Lord *Lyndhurst* reviews the authorities. "I do not know whether Lord *Hardwicke* is correctly reported, but if the case is accurately reported in Vesey, Lord *Hardwicke* expressed an opinion at variance with the decisions in the cases I have cited; and it is probable that what he said may have been incorrectly reported." He said what was unnecessary to the decision of the case before him, that when a consideration of natural love and affection is stated in a deed, another cannot be proved, because that would be inconsistent with the deed.

"In this case I am of opinion that evidence was properly received of a further consideration not mentioned, in addition to the consideration stated in the deed and not inconsistent with it."—Lord *Lyndhurst* cites *Villiers v. Beaumont*, 2 Dyer, 146; *Mildmay's case*, 1 Coke, 176 *a* 2; *Vernon's case*, 2 Coke, 1 *a*. p. 248; *Bedel's case*, 4 Coke, 40 *a* 131; *Doe Milburn v. Salkeld*, Willess, 673.

In *Gale v. Williamson*, 8 M. & W. 407, decided four years before *Clifford v. Turrill*, a deed purporting to be for "natural love and affection," and impeached as fraudulent by an execution creditor, was allowed to be upheld by proof of a bond of the same date given by the assignee to support the assignor and his children. *Alderson*, B., says—"The rule of law is, that a deed made merely in consideration of natural love and affection *prima facie* imports fraud; that alone shews that it is not conclusively but only presumptively fraudulent. It follows, therefore, that evidence may be adduced to shew that no fraud was in fact intended. This is not a case in which the parties to a deed are contesting some right arising out of the deed; the question is whether there was in the transaction in question an intent to defeat or delay creditors." *Rolfe*, B.—"The question in each case (under the statute) is whether the deed is fraudulent or not, and to rebut the presumption of fraud the party is surely at liberty to give in evidence all the circumstances of the transaction; not to contradict the consideration stated in the deed, but to take it out of the operation of the statute."

I may also refer to Taylor on Evidence, sec. 1040 ; Rex v. Inhabitants of London, 8 T. R. 379.

I do not consider that the fact of the deed declaring the trusts not being executed simultaneously with the registered deed to the trustees, but on the following day, will prevent the application of these cases. On the evidence of the case before us it seems clearly to have been one connected transaction ; that the consideration of the registered deed was evidently the pending assignment for creditors, and I should regret that the law was in such a state as to exclude evidence of the true consideration.

I do not think our registry laws can help the plaintiff. The registered deed contained all the statutable requirements, and as soon as we find that the authorities warrant our refusing to exclude evidence beyond the 5s. expressed, there would seem to be an end of the objection.

RICHARDS, J., agreed with HAGARTY, J. ; DRAPER, C. J., being interested in the estate, took no part in the judgment.

*Per cur.*—Judgment for defendants.

### CAMPBELL V. GRIER.

*Common Counts—Purchase of land—Verbal agreement for.*

Declaration—that defendant, by verbal agreement, contracted to sell a lot of land to plaintiff for £2500, and received on account of purchase money £50. The contract was afterwards mutually abandoned, defendant agreeing with plaintiff, in consideration of such abandonment, that he would repay the £50, provided that he (the defendant) sold the land for more than £2500 ; that defendant did sell, &c., yet refused to pay, &c., and on common counts, to which the defendant pleaded he did not promise. On motion for new trial,

*Held* that plaintiff cannot recover on common counts, the abandonment having arisen from his own inability to fulfil the agreement, and that on such ground there was no implied promise of defendant to pay, and

That the absence of a written agreement for the purchase of land did not entitle plaintiff to recover back his purchase money.

The declaration stated, that defendant having received from plaintiff £50 on account of the purchase money for No. 4, 4th concession of South Monaghan, which defendant, by a verbal agreement, contracted to sell to plaintiff for £2500 (but which contract was afterwards abandoned by mutual consent), agreed with plaintiff, in consideration of such

abandonment, to repay the £50 to plaintiff, provided defendant sold the lot to some other purchaser for more than £2500, and although the defendant did sell the lot to another purchaser for £2750, yet he refused on request to repay the £50 to plaintiff.

Counts for money had and received, and on account stated.

*Pleas*—1. Did not promise. 2. Never indebted.

The trial took place at the last spring assizes at Cobourg, before Sir *J. B. Robertson*, C. J. The plaintiff proved the following paper: "Received from Mr John Campbell fifty pounds currency, in consideration of a bargain between him and I, for lot No. 4 in the 4th concession of South Monaghan. Signed, Thomas Greer, South Monaghan, January 16th 1855." He then proved that defendant had sold the same lot to one James Leach for \$10,500, and had let Leach into possession on the 18th December 1856, and that Leach had paid defendant for the land. Another witness stated that he was present at a conversation between plaintiff and defendant after the above receipt was given—that it was stated that plaintiff was to pay defendant £1700 down, and the balance in three years—that defendant might sell for the sum which plaintiff was to give, £2500 to plaintiff's brother Thomas; that plaintiff and defendant should go to Port Hope together and try and sell the land for £2500, and that defendant promised that if he could sell the land for more than plaintiff was to give for it, he would pay him back the £50. Thomas Campbell swore that plaintiff was disappointed in selling a property of his own, on which he had reckoned when he bargained with defendant for this, and, in consequence, he could not complete the purchase. The defendant said he could sell for more than £2500, but witness refused to give more, but he offered to become security for his brother if the defendant would give more time, but they could not come to terms, and then defendant said he would sell the land, and if he got more for it he would pay back the £50 to plaintiff, which plaintiff claimed. The witness said it was defendant broke up the bargain. He did not know when plaintiff was to have made a payment next after the £50.

On the defence a daughter of the defendant's was called

She swore that in April 1856, about the time that plaintiff's payment fell due, he came to her father's house and said he could not meet his agreement; that he was sorry, and if defendant would not put him to further trouble he would not ask for the £50 back. Defendant said he could not then say what he would do. John Grier, a son of plaintiff, spoke of a second agreement between plaintiff and defendant relative to the sale and purchase of this land, and the £50 was to stand as a payment on that account. He heard plaintiff say he was to have paid £1700 in April 1855, and £300 more in the November following. William Grier, a brother of defendant, said he was at Port Hope when plaintiff and defendant met and talked over the terms of their first bargain. Plaintiff said he could not make his payments at the time, and asked to have until the 1st of June to make the next payment, the £50 to be reckoned part of it, and plaintiff was to pay interest; defendant said he was willing to enter into writings on those terms, but it was not done. Nothing was said about the £50 being paid back.

The learned Chief Justice held that the plaintiff could not recover on the common counts, and as to the 1st count he left it to the jury on the evidence to say whether such an agreement was in fact made by defendant, leaving the defendant to move on legal objections if the verdict was against him. The jury found for plaintiff £50.

In Easter Term *S. Richards*, Q. C., obtained a rule *nisi* for a new trial, the verdict being against law and evidence, and there being no sufficient evidence to support the first count, no proof of the consideration alleged or of any consideration, and no evidence to sustain the common counts, and for misdirection in not directing the jury that there was no consideration to sustain the promise laid in the first count, or to arrest the judgment on the ground that the verdict is general, and the first count does not shew a sufficient consideration for the alleged promise; that it does not allege that the plaintiff did abandon the contract, and that the contract alleged to have been abandoned was not binding.

*Bethune* shewed cause, citing Chit. on Con. 6 edition, 550;

Gosbell v. Archer, 2 A. & E. 500; Kaye v. Dutton, 7 M. & G., 807; Lovelock v. Franklyn, 8 Q. B. 378. Addison on Contracts, 21.

*Richards*, contra, cited Reynolds v. Crawford, 12 U. C. Q. B. 168; Barber v. Armstrong, 6 old series U. C. 543; Eastwood v. Kenyon, 11 A. & E. 438; Addison on Contracts, 12, 13; Hoskins v. Mitcheson, 14 U. C. Q. B. 651.

DRAPER, C. J.—I think the plaintiff is not entitled to recover on the common counts. The facts distinctly shew that the abandonment of the agreement arose from the plaintiff's inability to fulfil it, and no implied promise on defendant's part to refund the deposit could arise on such a ground any more than if plaintiff had directly refused to fulfil his engagement. The defendant seemed to have been willing to complete the sale, and the plaintiff was unable to complete the purchase. The case of Barber v. Armstrong, as far as it goes, is an authority against the plaintiff on this point, also that of Hoskins v. Mitcheson, 14 U. C. Q. B. 551; see also Healey v. Bongard, 1 U. C. C. P. 212, expressly deciding that the absence of a written agreement for purchase of the land does not entitle the plaintiff to recover back the money paid.

Then as to the first count, assuming that it is good, it was not proved, for there was nothing to show that the abandonment of the contract was at the request of the defendant, or with a view to his benefit or advantage, or that the plaintiff's promise was in any way moved or obtained by or in consideration of such abandonment. The evidence tends to shew the first agreement waived or abandoned, and an attempt made to make a new agreement, giving the plaintiff a longer time to pay, but which apparently fell through because the parties could not agree on the terms, and the promise of the plaintiff, as proved, rather implies an assertion of a right to keep the money although the contract was abandoned, unless on a subsequent sale a larger price was obtained than the plaintiff was to have paid. I think the jury might properly have been told that the plaintiff had failed to prove

the first count, because he had not proved a consideration for the defendant's promise.

I think therefore there should be a new trial, costs to abide the event.

*Per cur.*—Rule absolute.

### ANNES V. DORNAN.

*Chattel Mortgage—Power of sale in default—Re-purchase by mortgagee—Trustee.*

One D. holding a chattel mortgage upon certain property, with a condition therein that in default he should have power to sell upon due notice, and that the mortgagor, should he sell, should still be responsible for any balance unpaid; upon default being made he did sell, and re-purchased some of the goods, which he subsequently exchanged for land. Upon an action brought for the balance over the amount realised by the original sale, the defendant demurred on the ground that the plaintiff must be considered a trustee for him in the re-purchase, and having sold at an advance must account for the balance.

*Held* that this court could not deal with the case, and to obtain relief an application must be made to the Court of Equity.

DECLARATION on deed dated 30th June 1857, whereby defendant covenanted to pay to plaintiff £300 on the 30th June 1858.

*Pleas*—1. Payment. 2. Set-off. 3. On equitable grounds added at the trial that the deed mentioned in the declaration was a chattel mortgage for the purpose of securing the debt mentioned in the declaration. That the mortgage contained a condition that if defendant should make default in payment of the debt and interest, the plaintiff might sell the goods and chattels mortgaged, and out of the proceeds pay off the debt and interest, and pay the surplus, if any, to the defendant. That defendant did make default, and the plaintiff thereupon offered the said goods and chattels for sale at public auction, and suffered the same to be put up for sale in the absence of a reasonable number of bidders, and did himself buy in the same at a price much below their value, and under such pretended sale took possession thereof, and afterwards sold the same for a sum much greater than the said debt and interest, and in equity ought to account to the defendant for the surplus and be perpetually restrained from bringing this action.

*Replication* to the third plea, that the deed in addition to the covenant and condition in the plea mentioned contained the further covenant by defendant that in case the money realised by any sale should not be sufficient to cover the whole amount due at the time of such sale, that the defendant should forthwith pay to the plaintiff all such sums as should then be remaining due; and that the said auction was made upon due notice by plaintiff to defendant, and that defendant attended at the sale and himself purchased divers goods and chattels in the said deed mentioned, and by the plaintiff sold under the said condition; that the goods and chattels were *bona fide* put up at the said auction, and were purchased by plaintiff at their fair value, namely \$725, for which plaintiff has given defendant credit, and that the subsequent sale in the plea mentioned was an exchange of the goods for a lot of land and a house, and was not a sale for money, and that in such exchange the lot and house were valued at £350, and the exchange was made six months after the auction.

The defendant joined issue on the replication, and also demurred to it, on the ground that the plaintiff must be considered a trustee for the defendant in the said purchase of the goods, and having sold at an advance must account to the defendant therefor.

The plaintiff took issue on all the pleas, and excepted to the third, because it shewed no answer to the breach of covenant, but set up an accord and satisfaction or discharge without shewing that the sale took place before action was brought, and that the plea constituted no valid defence at law or in equity.

At the trial the defendant had a verdict, and in Easter Term *J. H. Cameron*, Q. C., obtained a rule *nisi* for a new trial on the law and evidence.

*Eccles*, Q. C., for the defendant, cited 2 Sugd. V. & P. 109 to 124; *Whichcote v. Lawrence*, 3 Ves. 740; *Ex parte Lacey*, 6 Ves. 625; *Ex parte James*, 8 Ves. 346-7; *Ex parte Bennett*, 10 Ves. 381; *Randall v. Errington*, 10 Ves. 423.

*Cameron*, Q. C., for plaintiff, cited *Knight v. Marjoribanks*,

11 Beav. 322, S. C., 13 Jur. 126 ; Beaden v. King, 9 Hare, 499.

DRAPER, C. J.—Assuming the plea to be good, and that the case falls within the principle of a trustee purchasing for his own benefit the trust property, and that Lord *Eldon's* language—"He who undertakes to act for another in any matter shall not in the same matter act for himself," and "therefore a trustee to sell shall not gain any advantage by being himself the person" to buy—is applicable to a case like the present, where the plaintiff was mortgagee of chattels with an express power to sell and to pay himself ; it nevertheless appears to me that the replication shews facts which prevent our holding that there was a defence available in a court of law, as affording ground for an absolute and unconditional injunction in Chancery, and therefore for a judgment here *quod defendens eat sine die*.

Here, if the re-sale by the plaintiff had been for money, the difference between the price given and the price obtained might (apart from any consideration of delay, as indicating acquiescence) have been considered as the money of the mortgagor, but as received by the mortgagee to be applied towards satisfying the mortgage debt. If it were just enough, the defence would be sustained ; if more than enough, the defendant could not recover the balance here ; if less than enough to pay off the mortgage, the plaintiff would be entitled to recover the deficiency. I suppose on proper pleadings a court of law might so far dispose of the question.

But here the goods have been exchanged for land, and the price of the land may have been, and most probably was, one fixed in reference to the manner it was to be paid for. The land may, and I apprehend must, be treated as standing in the place of the goods sold under the power and bought by the plaintiff. If this be the result of the plea, then to arrive at a determination of the respective rights of plaintiff and defendant the land must either be sold, or its true price and value be in some other way determined. If so, I do not see how this court can deal with such a matter—it belongs to a Court of Equity, which can do full and complete justice be-

tween these parties, and direct the necessary enquiries to be made and steps to be taken for that purpose.

I think, therefore, the plaintiff should have judgment on this demurrer, and that the rule for a new trial should be absolute.

As to the general question of the sale by plaintiff as a trustee, I refer to Fox and Mackreth, and the notes, 1 Wh. and Tud. 92, 1 Story Eq., sec. 322 *et seq.*

*Per cur.*—Rule absolute.

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### OVENS V. DAVIDSON.

*Survey—Boundary line commissioners—Validity of work done by subordinate.*

*Held* that a line run by a subordinate and adopted by the principal (surveyor) is the work of the latter, and must be treated as such.

2. That it is by the work as executed on the ground, and not as projected before execution, or represented on a plan afterwards, that the boundaries are to be determined.

The plaintiff complained of a trespass to the east half of No. 3, 2nd concession north of Black river, township of Marysburgh. The defendant pleaded not guilty, and that the close in which, &c., was not plaintiff's, contending that it was a part of gore A. in the said township.

At the trial a verdict was rendered for the plaintiff, subject to the opinion of the court on the whole evidence.

The plaintiff relied upon a survey recently made by provincial land surveyor John Emerson, under the following circumstances—

On the 7th of May 1857 certain inhabitants of the township of Marysburgh, being owners or occupiers of land in the 2nd concession, and nearly all who were affected by this line, petitioned the municipal council of the township, representing that there was more or less uncertainty or doubt about the limits between the rear of that concession and gore A. That about 1839 an application was made to the boundary line commissioners to establish the limits, &c., of the said concession, which in that year was pretended to have been done according to law, but which was informal and defective, on account of the surveyor employed not actually placing a monument at the north-easterly angle of the said

concession, as they (the boundary line commissioners) suppose from his report he had done, and prayed the council to apply to the government to have the same so far surveyed as that stone monuments might be placed at the several governing points of the said concession, by competent authority, especially on the rear of the said concession.

Upon this petition the municipal council, on the 13th of June 1857, resolved that there be a survey made in the 2nd concession, north of Black river, in the township of Marysburgh.

On the 8th of October 1857 the Commissioner of Crown lands wrote to Emerson, stating that the Governor-General, on the application of the municipality of Marysburgh, had ordered the above mentioned survey to be made in accordance with the statute 12 Vic., ch. 35, and instructing him to perform it. Copies of the plans, field-notes, and other documents having reference to this boundary line were forwarded to him for his information and guidance. He was directed to make diligent search for, and also to adhere to, the lines drawn and posts as planted in the original survey, or legally established by the boundary commissioners, and on completing his operations in the field, to prepare plans shewing the positions of the permanent monuments he should place. The residue of his instructions was not material to the point in dispute.

On the 26th of February 1859 Emerson made his report, in which he stated that he made an examination of the survey Mr Elmore had made under the authority of the boundary line commissioners, and found that Elmore had planted some monuments on the front and rear ends of the line between lots 12 and 13, in the 2nd concession, thus establishing a governing boundary line for the side lines of all the lots in that concession; that Elmore planted a stone monument in front of said concession, at the south-east angle of lot No. 1. That he considered these three monuments, which were planted by Elmore himself, under the authority of the boundary line commissioners, and before he made his return of the survey to them, to be unalterable, and he was governed by them in his survey of the concession line in rear of the

2nd concession. He then stated that Mr J. O. Conger, who in 1839 was an apprentice of Elmore's, averred that he ran the concession line in rear of the concession for Elmore, commencing at a post at the north-east angle of No. 12, and not at the stone monument previously planted by Elmore at the north end of the line between Nos. 12 and 13, and ran the line easterly till it intersected the rear of the 2nd concession south of the Bay of Quinte, and planted a post; that no stone monument was planted on his (Conger's) line until July 1855, when he planted one at the rear of the 2nd concession, between lots 2 & 3; that the same stone monument was removed to another place, and that on the 25th of August 1856 he (Conger) and Elmore planted a stone monument in the same place that he would have planted it if he had done it at the time the survey was completed. The report further stated that Elmore, finding that Conger did not commence to run this line at the stone monument planted by him, but at a post in the rear of the side line between lots Nos. 11 & 12, in 1854 or 1855 ran another concession line, commencing at that stone monument, easterly till it intersected the allowance for road in rear of the 2nd concession south of the Bay of Quinte, and planted a stone monument at the end of that line, which differed from the line run by Conger, and neither line was correct, because "not parallel to the concession line in front of said concession." That the stone monument represented on Elmore's plan as having been planted on the rear or north end of the line on the east side of No. 1, 2nd concession, was not planted by Elmore or Conger, from which he (Emerson) concluded that Conger's line, which he ran from the rear of the 2nd concession, was not the line established by the commissioners, not having been completed at the time the commissioners gave their decision, no monument having been planted for many years afterwards. That he (Emerson) considered any survey made by Elmore or Conger after the boundary line commissioners had given their decision, and after their plans had been received, would not be established by the commissioners' authority. That Conger's line not being parallel to the concession line in front, if not established by the authority of

the commissioners, is not the correct boundary between the 2nd concession and the gore ; and Elmore's line is equally objectionable, not having been run until 1854 or 1855, and not being parallel to the front of the 2nd concession. The report then stated that Emerson ran a straight line from the stone monument in front to that in rear, between Nos. 12 & 13, and chained its length, 106 chains 30 links, exclusive of road allowances. He then ascertained the angle which a straight line run from the stone monument in front of the line between lots Nos. 12 & 13, to the stone monument at the south-east angle of lot No. 1, would make with the line between lots 12 & 13, he proceeded to the stone monument in rear of that line, and laid off the concession line for the rear of the 2nd concession truly parallel to the concession line in front, and produced the line easterly until it intersected the line on the south side of the allowance for road in the rear of the second concession south of the Bay of Quintè, and planted a stone monument at the east end of that line, and chained its length, 190 chains 43 links, and then ran the side line on the east of No. 1, commencing at the stone monument at the south-east angle of that lot, parallel to the governing line between lots 12 and 13, and planted a stone monument at the end of that line at the north-east angle of No. 1, and chained its length, 72 chains 26 links, exclusive of road allowances, and thus succeeded in completing the boundaries of said concession. With this report he sent a plan of his survey.

On the 12th of March 1859 the Commissioner of Crown lands wrote that Emerson's returns of surveys having been examined and found correct, he enclosed copies thereof to the municipality of Marysburgh, with the certificate and order for paying him.

The report of the boundary line commissioners referred to in the foregoing report, and dated the 31st of October 1839, set forth an application by the inhabitants of the second concession north of Black river in Marysburgh, requiring them to establish and determine a governing line for the side lines of lots therein, and to establish a line in rear of

said concession, and that they having heard the evidence adduced, and duly considered the same, did adjudge and decree, 1st, that the line between lots 12 and 13 in the said concession, "as at present surveyed, and stone monuments erected thereon," shall be a governing boundary, &c. Secondly, we do order that the line run from the stone monument planted in rear of lot No. 2 in the said concession, shall be taken and considered as the true and correct line in rear of that part of the said second concession.

A copy of Emerson's plan, and of the plan of Elmore's survey, approved by the boundary line commissioners, were filed.

Emerson swore that at his survey the plaintiff and defendant and several owners of lands both in this 2nd concession north of Black river and the gore were present. They did not desire him to take any evidence but Conger's, and he (Emerson) proceeded to run the lines according to Conger's information. He did not put Conger upon oath, as he was a provincial land surveyor. He directed Conger to confine his evidence to what he and Elmore had done upon the survey for the boundary line commissioners before Elmore had made his return to them. He found monuments planted at that survey, three as detailed in his report. Conger stated that these were the only monuments that Elmore had planted before he made his return, and Emerson planted two others, as shewn on his plan, one at the north-east angle of lot No. 1, and the other at the north limit of lot No. 3. He ran from the stone monument planted by Elmore at the north-west angle of No. 12 a line parallel to the front of the 2nd concession, until it intersected the allowance for road on the south side of the 2nd concession south of the Bay of Quintè. He also ran a line from the monument at the south-east angle of No. 1 parallel with the side line between lots 12 and 13, until it intersected the road allowance last mentioned, and there planted a monument. He stated that he followed his instructions strictly, and that his survey corresponded with Mr Elmore's as far as he (Elmore) performed his work; that his (Emerson's) survey supplied what Elmore left incomplete. He produced a tracing furnished to him

from the Crown lands office of the boundary line commissioners' plan of survey, and said that his plan adopted precisely the line shewn on this tracing, in front of the 2nd concession, between the monuments at the south-west angle of No. 12 and the south-east angle of No. 1. The trespass was proved if Emerson's north line is the true line.

A nonsuit was moved for, 1st, because the statute under which Emerson was directed to act does not apply to disputes between concessions and gores, but between concessions only.

2. That the petition to the municipal council was not proved to have been signed by the parties whose names appeared to it.

3. That it was not sufficiently shewn that the application for the survey proceeded from the municipal council; the act 18 Vic., ch. 83, sec. 8, does not authorise the municipal council of the township to petition for the survey.

4. That the survey by Emerson was not according to law, as he took Conger's statement without putting him on oath.

The objections were overruled in order to reserve the whole legal question for the court.

On the defence Conger swore that he had run the line in dispute, *i.e.*, the line marking the rear of the 2nd concession north of Black river, in 1839. He started from a point one chain north of a monument planted at the north-west angle of the gore. Elmore directed him to measure 105 chains 27 links on the line between Nos. 5 & 6 in the 2nd concession, starting from the front of the concession, and to draw a line from the first mentioned starting point through the point formed by measuring 105 chains 27 links to the allowance for road south of the 2nd concession south of the Bay of Quintè. He did so, and at the point where his line intersected this allowance for road he planted a square wooden stake not marked in any way. This line he stated was nearly parallel to the front of the concession from its starting point to the line between Nos. 5 & 6. There would be a difference of 1 chain 9 links between those two points from the parallel, that is, south of a parallel line, continuing

to the east; his line approached the front line 1 chain 59 links nearer than a parallel line would have been. He was at that time an apprentice of Elmore. He understood Elmore intended the line should have been parallel. Subsequently there was a monument planted by Elmore at the point where he had placed the wooden stake. This was done in 1856. He explained Elmore's reason, which has no bearing on this case; but he stated positively this monument was planted in the place where he had put the stake. On cross-examination he said that Elmore instructed him to commence running the line at the stone monument between Nos. 12 & 13. When they planted the stone monument in 1856 they did not find the old stake planted in 1839; they ascertained the point by the blaze of his old line, and measuring the width of the road in front of the 2nd concession south of the Bay of Quintè.

Peterson, also a surveyor, swore that Conger had on different occasions pointed out to him the old line between the gore and the 2nd concessions, confirmed, as he said, by the boundary line commissioners.

It was also proved that in 1845 Elmore recognised Conger's line as the one between the gore and the 2nd concession.

Conger also stated that he proposed to Elmore in 1839 to go and plant a stone monument where the wooden stake was placed; Elmore said he had employed a farmer in the neighbourhood, one Minkes, and had paid him to do it, and he was, as Conger believed, satisfied that Minkes had planted this monument when he, Elmore, made his return to the boundary line commissioners. Elmore's plan, as returned, shewed the lines in front and rear of the 2nd concession to be parallel.

*C. S. Patterson*, for plaintiff. Surveyor of boundary commissioners in 1839 returned that he had planted monuments, which in fact he did not. He planted three; he returned that he planted four, which was not the case. 18 Vic., ch. 83, sec. 8.

*Richards*, Q. C. The line run by Conger, under Elmore's direction, is visible on the ground. The statute gives no authority to the government to override any line which is

traceable, and declared by law to be final or unalterable. Raile v. Cronson, 9 U. C. C. P. 9; Reg. v. Rose, 12 U. C. Q. B. 637.

DRAPER, C. J.—This plan returned by Elmore is marked by him as the “Plan of that part of the 2nd con., north of Black river, in the township of Marysburgh, shewing the manner in which it has been surveyed, and also the places at which the stone monuments have been erected upon it.” It shews the three monuments mentioned by Emerson, one where the line on the rear of the 2nd con., north of Black river, intersects the road south of the 2nd con., south of the bay of Quintè, and another at the north-east angle of No. 1. On the face of the plan is the following certificate: “We do hereby certify that we have established a governing line for the side-lines in the 2nd con., north of Black river, Marysburgh, *and established a line* in rear of the said concession agreeable to this plan.” Signed, &c.

Now the only line in rear of the said con., which had been run under Elmore’s direction, was that run by Conger, and the question is whether that line is, under the circumstances, established by the boundary commissioners.

On the part of the plaintiff it is argued that it is not so established. The following appear to be the principal reasons:—

1st. That Elmore did not run this line himself, and that Conger’s running it by his direction, but in his absence, did not make it a part of Elmore’s survey under the authority of the B. L. Commissioners.

2nd. That Elmore’s intention was that the line should be run parallel to the line in front of the concession; that Conger did not run it in accordance with that intention, and therefore it was not run under Elmore’s authority.

3rd. That Elmore’s plan led the commissioners to suppose the front and rear of the 2nd con. were parallel lines, and that the boundary line commissioners intended to establish such a rear line as the plan shewed, and not such a line as Conger ran.

4th. That no stone monument at the east end of the line,

in rear, where it intersects the other concession road, was *in fact* planted, as Elmore's note on his plan represents, wherefore such a monument could not be confirmed, for it did not exist.

5th. That though Elmore returned his plan, shewing his survey complete, he had not in fact completed it, and therefore the decision of the boundary line commissioners can establish no more than what he had then done.

As to the first of these reasons, I have no doubt if Elmore did in fact employ and direct Conger, his apprentice, to run the line in question, and adopted the line when run by Conger as his own work, and so reported it, and returned it on his plan, it must be treated as his work, and if approved and confirmed by the commissioners, is as much binding as if he had actually run it himself. No other line but this was run, and there certainly was evidence enough to show Elmore's direction and subsequent adoption of it, and when he returned the plan of the whole work as complete, he in effect returned this line as a part of his survey.

Coming to this conclusion, I can give no greater effect to the fact that the line was meant to be parallel to the front of the concession, but was not in truth so parallel, than if Elmore had himself run the line just as it is. In such event the same rule must, I apprehend, govern us as if it were the case of an original survey. It is by the work as executed on the ground, not as projected before execution or represented on the plan afterwards, that the actual boundaries are determined, and therefore I do not think this reason can prevail. I am of course assuming that the surveyor in his work and plans has not been acting *malâ fide*; what effect that might have we are not now called upon to consider.

The same answer must, in my opinion, prevail as regards the intention or belief of the boundary line commissioners in confirming the plan and survey as represented by it. Experience in courts of law affords ample proof that the surveys on the ground, and the plans of them received and acted upon in the Crown land office, differ to a much greater extent than in this instance.

I do not feel that there is anything in the fourth reason,

though the Municipal Council in their petition, and Mr Emerson in making his survey and giving his evidence, relied upon it, inasmuch as he evidently drew a difference between what Mr Elmore had done and what is represented on his plan, for he adopts and follows the three stone monuments which Elmore himself planted, and rejects the line run by Conger under Elmore's direction, and the *terminus* of that line, because no stone monument was planted there for many years. The certificate of the commissioners makes no direct reference to any of the monuments, but it states in express terms that they had "established a line in rear of the said concession agreeable to this plan," which, as I think, established the line run by Conger by the direction of Elmore.

Whether Elmore completed his survey is of course a question of fact. If I am right in my conclusion that the line run by Conger is a part of Elmore's survey, then it was completed, and as I have adopted this conclusion, this reason fails also, which in effect displaces Mr Emerson's survey as one which completed what Elmore had left undone.

It follows, in my opinion, that the boundary line commissioners in 1839 decided the question which the plaintiff raises in this action, and that their decision is final. It is the evident intention of the government, in accordance with the law, to maintain this decision, or if there were no traces by which the boundaries so established could be ascertained, to fall back upon the original survey. Emerson was accordingly directed to adhere to the lines drawn and the posts as planted in the original survey, or legally established by the boundary line commissioners. Mr Emerson has, I fear, been led into a mistake by the language of the petition of the Municipal Council and by the use of the word "*legally*." He has rejected Conger's line, the only one of which there was proof, and which Elmore adopted and returned, because he has assumed it was not *legal*, inasmuch as Elmore was not present when it was run; that it was not legally established, and that it is incorrect in his opinion, because it is not truly parallel with the front line of the concession. There is nothing to show that the line run at the

original survey was thus parallel on the ground ; and if there be neither trace nor monument of the original survey, there is nothing to show that if the statutory directions applicable to such a case were followed, Emerson's line, on which the plaintiff relies, would be right. No doubt, theoretically, the front and rear lines of a concession should be parallel, but in practice everyone knows the contrary is often the case.

I think it our duty to lean against overturning lines and boundaries which have been pronounced upon as established for many years, and apparently acquiesced in, unless upon the clearest grounds, and in my opinion the evidence is amply sufficient to sustain the decision of the boundary line commissioners.

The *postea* should be delivered to the defendant.

*Per cur.*—*Postea* to defendant.

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## MEAGHER V. THE HOME INSURANCE COMPANY.

*Insurance Policy—Conditions—Pleading.*

Declaration (alleging a total loss) on a policy for \$5000 on the hull, tackle, apparel, and other furniture of the steamer "Boston," which stated the value to be \$15,000. That in case of loss prompt notice of the disaster and plan adopted for the recovery and saving, &c., should be given, to sue, labour, and travel, &c., &c., without prejudice to the insurance, and after survey as therein provided, insured were to cause the same to be repaired; and, in case of refusal, insurers were authorised to interpose and cause the same to be repaired, &c. All acts done or committed to be for the benefit of all concerned, and not to prejudice parties; that the insured should have no right to abandon unless under particular circumstances, and under no circumstances except by written notice delivered to the authorised agent of the insurers, nor unless such notice should be sufficient to vest in the company an unencumbered and perfect title to the subject abandoned. By an endorsement on the policy the vessel was insured *against total loss only*. Averment that plaintiff duly abandoned to said defendants, who thereupon accepted the said abandonment.

2nd Plea—That the vessel became stranded while proceeding upon her voyage, and plaintiff ought to have used prompt and efficient means for her safeguard and recovery, and repaired her when recovered; but plaintiff neglected and refused, and thereupon defendants interposed according to the terms of the policy, recovered and repaired the vessel, and put her in as good repair as before she was stranded, and offered to restore her on payment by plaintiff of his fair proportion, but he refused; and that defendants caused a proper survey to be made before repairing. Upon demurrer held to be no answer, because this plea does not shew there was no constructive total loss, and the right so to act must, under the terms of the policy, be taken to be for the benefit of all concerned, and without prejudice to the rights of either party.

3rd Plea—That plaintiff did not duly abandon, nor did defendants accept abandonment as alleged.

4th Plea—That the abandonment as alleged was not sufficient to convey to and vest in defendants an unencumbered title to the vessel. Both pleas held good on demurrer, because, if not traversed, they would lessen the proof to be given for a constructive total loss (with a view to which the declaration seemed framed).

5th Plea—That if the note given for the premium should not be paid at maturity, the full amount of premium should be considered earned, and the policy should become void while said note remained over-due, and that plaintiff did give his note, which remained over-due at the time of the commencement of suit upon demurrer.

Held that there being a provision in the policy that the premium note in case of loss should be deducted before payment of the amount insured, and the premium note not being shown to be due when the loss occurred, the plea was bad.

DECLARATION on a policy of insurance, whereby defendants insured plaintiffs in the sum of \$5000.

Writ issued on the 21st November 1859.

The portions of the policy required to be noted for the purposes of this decision are as follows—

The plaintiff on the 27th of April 1859 caused to be made a certain policy of insurance with the said defendants,

whereby, subject to the several provisoes, conditions, and agreements mentioned, contained, and particularly set forth in the said policy, the said defendants did cause five thousand dollars to be insured upon the body, tackle, apparel, and other furniture of the steamer of the plaintiff called the "*Boston*," wherever she was in safety at noon of the 16th day of April 1859, and from thence to noon of the 30th day of November 1859; and in the said policy the said vessel, tackle, apparel, &c., thereby insured were valued at fifteen thousand dollars, without any further account to be given by the assured to the assurers for the same. And it was in the said policy also declared that touching the adventures and perils which the *Ætna Insurance Company* was called to bear and take upon itself by the said policy, they were of the lakes, rivers, canals, fires, jettisons, that should come to the damage of the said vessel or any part thereof, with certain exceptions not necessary to be stated for the purposes of this demurrer. And the said assurers thereby acknowledged the receipt of a note at four months from the said plaintiffs for the consideration of the said insurance; and in and by the said policy it was also declared and agreed (amongst other things) that in case of loss or misfortune it should be lawful and necessary to and for the assured, his agents, factors, servants, and assigns, to give the assurers prompt notice of the disaster, and plan adopted for recovering and saving the property, to sue, labour, and travel for, and to make all reasonable exertions in and about the defence, safeguard, and recovery of the said vessel or any part thereof, without prejudice to the said insurance, and after recovery and the holding of a survey by persons chosen by the insurers and insured or their agents, made under oath, setting forth the particulars of actual damage received by the vessel in the disaster, and discriminating between those and former defects and wear and tear, the insured were to cause the same to be forthwith repaired; *and in case of neglect or refusal* on the part of the insured, his agents or assigns, to adopt prompt and efficient measures for the safeguard and recovery thereof, or to repair the same when recovered, then the insurers were thereby authorised to interpose and recover the said vessel and

to cause the same to be repaired for the account of the insured, to the expenditure whereof the said insurance company would contribute according to the proportion the sum insured bore to the valuation aforesaid, and the surplus, if any, advanced by the said insurers (including the premium note, if unpaid) should be a lien upon and should be recoverable against the said vessel, or any part thereof, or against the insured, at the option of the insurers. But no partial loss or particular average should in any case be paid by the insurers, unless amounting to fifty per cent. of the valuation aforesaid, and that each passage from port to port should be subject to its own separate average. And it was thereby also declared and agreed that losses should be payable in sixty days after proofs of such loss or damage, and of the amount thereof, and proof of the interest of the insured should be made and presented at the office of the said company [the amount of the premium on the said policy, if unpaid, and all other indebtedness due the said company being first deducted from the amount of the actual cost of repair or estimate for the same, except on anchors], and no partial loss should be claimed or paid unless amounting to a particular average after such deduction. And it was also thereby agreed that the acts of the insured or insurers, or their agents, in recovering, saving, and preserving the property insured in case of disaster, should not be considered a waiver or acceptance of an abandonment, nor as affirming or denying any liability under the said policy; but such acts should be considered as done for the benefit of all concerned, and without prejudice to the rights of either party; and that, further, the insured should not have the right to abandon the said vessel in any case unless the amount which the insurers would be liable to pay under an adjustment, as of a partial loss, exclusive of general average, and charges of the nature of general average, should exceed half the amount insured; nor should detention by the season, or by any other cause, be alleged or allowed as cause for abandonment. And that moreover no abandonment in any case whatever, even when the right to abandon might exist, should be held or allowed as cause for abandonment, unless it should be in writing, signed by the insured, and delivered to

the said company or their authorised agent, nor unless it should be efficient, if accepted, to convey to and vest in the said Insurance Company an unincumbered and perfect title to the subject abandoned; and the valuation of the vessel expressed in the said policy should be considered the proper value in adjusting losses covered by the said policy. And it was thereby also agreed that the said policy should become void if any other insurance was or should be made upon the vessel thereby insured which together with the said insurance should exceed the sum of ———. And by a memorandum endorsed upon the said policy it was agreed *that the vessel was thereby insured against total loss only*, and that no claim for general average loss or particular average loss should attach under the said policy. Averment of wreck of vessel in the St Lawrence, and thereby became wholly lost to the plaintiff, of all which the defendants then had due notice; and the plaintiff thereupon duly abandoned the said vessel to the said defendants, who then accepted the said abandonment.

Averment, that at the time of the said loss of the said vessel the said policy was in full force and effect. And that the plaintiff hath in all things performed and fulfilled on his part the several conditions and agreements contained in the said policy of insurance—whether in the nature of conditions, precedent or otherwise—on his part to be observed or performed.

1st plea—Denial of loss, *modo et formâ*.

And for a 2nd plea the defendants say, that after the said vessel became stranded as aforesaid, the plaintiff ought to have used prompt and efficient means for the safeguard and recovery of the said vessel, and repaired the same when recovered; yet the plaintiff wholly neglected and refused to adopt prompt or any means for the safeguard or recovery of the said vessel, or repairing the same; and thereupon the said defendants did, upon the terms of the said policy, interfere, interpose, and recover the said vessel, and cause the said vessel to be got off the said rocks and taken into port; and the defendants did then cause the said vessel to be thoroughly and properly repaired, so that said vessel was

thoroughly sound and seaworthy, and put in as good a state of repair and condition as before being stranded, for and on account of the plaintiff. And the defendants were always and still are ready and willing, and offered the plaintiff to restore to him the said vessel so repaired as aforesaid upon payment by him of his fair and reasonable proportion of such repairs. But the plaintiff refused to accept the said vessel, and before making such repairs the defendants caused a proper survey to be made according to the terms of the said policy.

3rd plea—That plaintiff did not duly abandon the said vessel.

4th plea—That the abandonment in the declaration mentioned was not efficient to convey to and vest in the said defendants an unincumbered and perfect title to the said vessel.

5th plea—Non-payment of premium note *before commencement of suit*.

To the third and fourth pleas the plaintiff demurred on the following grounds:—

1. These pleas, if found in defendants' favour, would not be any answer to the plaintiff's claim as stated in the declaration.

2. The plaintiff's claim is for a total loss, and these pleas endeavour to raise an issue upon what is mere matter of evidence, which may or may not be necessary for the plaintiff to adduce to substantiate his claim, depending upon the total loss alleged in the declaration being absolute in its nature or only constructively so.

3. The defendants also in these pleas set forth that which is a question of law for the court, and not for a jury to determine.

Demurrer to fifth plea, that

1. The said plea to have been any answer to the plaintiff's suit should have contained an averment that the said promissory note matured before the loss in the declaration mentioned was sustained by the plaintiff.

2. The said promissory note may have matured and remained unpaid before the commencement of the plaintiff's

suit; but upon the true construction of the policy declared upon, and the condition mentioned in this plea, this is no answer to the plaintiff's claim, if the said note was not due at the time the plaintiff's loss was actually sustained, and the present cause of action accrued.

3. Again, although the said premium note may not have been paid, as alleged in the said plea, yet if the said note did not become payable until after the happening of the said loss mentioned in the declaration, the non-payment of the said note would only have been ground for the deduction of the amount thereof from the amount of the policy, and forms no suspension of the plaintiff's right of suit.

Demurrer to second plea by leave of *Burns, J.*

1. That the policy, as set forth in the declaration, covered a "total" and not a "partial" loss, and the plaintiff's right of suit therefore is only in respect of a total loss, and plaintiff declares for total loss only, and in the case of a total loss the defendants have no such right, either under the policy or at law, as that claimed in the second plea, of repairing and returning the said vessel so repaired to the plaintiff.

2. The said plea amounts to an argumentative denial of the loss declared upon, and any issue joined upon it would form no answer to the plaintiff's action, as set forth in his declaration.

*Crooks and J. H. Cameron, Q. C.*, for plaintiff, referred to 2 Arnould, 992; Reindell v. Schell, 4 C. B. N. S. 97; Anderson v. Fitzgerald, 4 H. of L. 484; Notman v. Anchor Ins. Co., 4 C. B. N. S. 476; Sheridan v. Phoenix Ins. Co., 5 Jur. N. S. 142; Cammell v. Sewell, 3 H. & N. 617; Stewart v. Greenock Marine Insurance Co., 2 H. of L. 176; Arnould 1060, 1086; Holdsworth v. Wise, 7 B. & C. 794.

*Anderson* for defendants.

DRAPER, C. J.—The policy in this case contains clauses not to be found in the policies of marine insurance in general use in England.

The second, third, and fourth pleas are founded on three clauses or conditions in this policy.

The first of these three conditions is in substance, that in case of loss or misfortune it shall be necessary for the assured to give the assurers prompt notice of the disaster and plan adopted for recovering the property; to labour, &c., and make all reasonable exertions for the defence, safeguard, and recovery of the vessel without prejudice to the insurance, and after recovery and holding a survey, as therein specified, the insured were to cause the same to be forthwith repaired; and in case of neglect or refusal on the part of the assured, to adopt prompt and efficient measures for the safeguard and recovery thereof, or to repair the same when recovered, then the insurers were authorised to interpose and to recover the vessel, and to cause the same to be repaired for the account of the assured, to the expenditure whereof the insurance company would contribute according to the proportion the sum insured bore to the valuation, and the surplus, if any, advanced by the insurers (including the premium note if unpaid) should be a lien upon the vessel, as against the insured, at the option of the insurers.

The second plea states that the vessel, while proceeding on her voyage in the *St Lawrence*, ran upon a reef of rocks and became stranded, which is the loss in the declaration mentioned. That after she became stranded the plaintiff ought to have used prompt and efficient means for her safeguard and recovery, and to have repaired her when recovered, yet plaintiff wholly neglected and refused so to do; and thereupon defendants interposed and recovered the said vessel, got her into port and repaired her thoroughly, so that she was sound and seaworthy, and was put into as good repair and condition as before she was stranded, on the plaintiff's account; and defendants expended a large sum in such repairs, and were and are ready and willing, and offered the plaintiff to restore him the vessel so repaired upon payment by him of his fair proportion of such repairs; but plaintiff refused to accept her, and before making such repairs defendants caused a proper survey to be made according to the terms of the policy.

To this plea the plaintiff demurs.

There is another condition in this policy to which attention

should be paid, "that the acts of the insured or insurers in recovering, saving, or preserving the property insured in case of disaster shall not be considered a waiver or acceptance of an abandonment, nor as affirming or denying any liability under the policy; but such acts should be considered as done for the benefit of all concerned, and without prejudice to the rights of either party."

The plaintiff sues for a total loss, of which he avers the defendants had due notice. This plea professes to answer that demand by setting up the recovery and repair of the vessel by the defendants, and their readiness to restore on payment of a fair proportion of such repairs.

I think this plea is no answer. First, the right of the defendants so to act, and the effect of what they do in the exercise of that right, must be taken with the qualification that such acts are to be considered as done for the benefit of all concerned, and without prejudice to the rights of either party. All they aver they have done does not necessarily shew there was no *constructive* total loss, though they negative an *actual* total loss.

It is true the right of the assured to recover as for a total loss depends not merely on the state of things when the notice of abandonment is given, but on what exists at the time of action brought (Arnould, 1069, 2d Ed.); and in *Raphael v. Pickford*, as reported in 7 Jurist, 815, *Cresswell, J.*, observes, "In the case of a ship, if there be an abandonment, you may treat that as a loss at the time, but if the ship were afterwards restored you could not treat it so."

But this last observation must be qualified by the principles on which the right to abandon and claim for a constructive total loss rests, and this is stated by *Tindal, C. J.*, in *Benson v. Chapman*, 6 M. & G. 810, to be, "Where the damage to the ship is so great from the perils insured against as that the owner cannot put her in a state of repair necessary for the pursuing the voyage insured except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon and treat the loss as a total loss." And it is also well settled that in determining the cost of the repairs as compared with the

value of the ship, the valuation in the policy is immaterial, and the true test whether the owner should or should not repair is whether the cost of repair will exceed the marketable value of the ship when repaired." (Arnould, 1116.)

A different measure of value obtains in the United States, though the rule is the same. There is a clause in this policy which no doubt is usual in the policies used there in accordance with their law, as the defendants are an American company.

Now this plea affords no means of determining whether the cost of repair was or was not so great as to bring the case within the English rule. For all that appears, it may have been so great as to give the plaintiff a right to treat the damage as a total loss.

On either ground I think this plea bad. First, for treating what I think is a qualified right as an absolute right; and second, for not shewing enough to bar the plaintiff from claiming for a constructive total loss.

As to the third plea. The plaintiff has so framed his declaration as to be able to claim for an absolute total loss, or a constructive total loss. If he never gave any notice of abandonment he can recover for the former, whereas notice of abandonment is necessary if he sues on account of the latter. The plaintiff has averred an abandonment of the vessel, and the defendants' acceptance thereof, both material allegations as respects *constructive* total loss. The admission of these allegations by the defendants (and not being traversed they would be admitted) would lessen the proof to be given to entitle plaintiff to recover for a *constructive* total loss. I think therefore the defendants have a right to traverse these allegations, and that this plea is good.

The fourth plea is founded upon the following clause in the policy—"That no abandonment in any case whatever, even when the right to abandon might exist, shall be allowed as cause for abandonment, unless it should be in writing, signed by the insured and delivered to the said company or their authorised agent, nor unless it should be efficient, if accepted, to convey to and vest in the said insurance company an unincumbered and perfect title to the subject aban-

done.” What is to be done if an owner insures a valuable ship with two or more companies, each of whom has a similar clause in their policy, or how the right of abandonment is in such case to be exercised, may create difficulty. Still I see nothing to prevent the parties making such a contract, and it is consistent (if the abandonment be to all the insurers *pari passu*) with the definition of abandonment, the act of cession by which in cases where the loss or destruction of the property, though not absolute, is highly imminent, the assured on condition of receiving at once the whole amount of the insurance relinquishes to the underwriters all his property and interest in the thing insured as far as it is covered by the policy, with all the claims that may ensue from its ownership, and all the profits that may arise from its recovery (Arnould, 1009). Here the parties have agreed that in order to make the abandonment binding upon and effectual against the insurers, it shall be also effectual to convey to them an unincumbered and perfect title to the thing insured. This, of course, applies to a *constructive* total loss, but, for the reasons already given, I think the defendants have a right to treat the declaration as founded on such a loss. This plea is therefore justified by the averment in the declaration, which would be redundant if the plaintiff sought to recover for an absolute total loss, and by the condition of the contract as to abandonment. I think, therefore, this plea is good.

I think the fifth plea bad. According to the declaration and this plea we must assume the premium note had not matured when the loss occurred. The plaintiff was in no default *then*, and from that moment his right to recover depended on fulfilling the conditions required by the policy *in the event of any casualty*. The payment of the premium note was not one of these. That rested on conditions and stipulations applicable to itself. One of these was, that if not paid at maturity the full amount of premium should be considered as earned, and the policy should become void *while the said note remained so unpaid*. I think this condition assumes the continued existence of the subject insured. It would be absurd to talk of earning the premium by a con-

tinued insurance when the ship is lost, and such an event may (as is alleged in the present case) happen long before the premium note full due. After the total loss there was not, nor could there be, any further earning of premium, unless payment of the amount insured be so treated, and it will hardly be contended that the meaning of the clause is, that if, after a total loss which happens while the premium note is current, the note is left unpaid at maturity, the premium is considered earned by the insurance being considered as paid.

There are two provisions in the policy which I think sufficiently shew no such meaning was in the contemplation of the parties, but that they were only providing for the possible event that a casualty might occur after the premium note had matured and was unpaid. One of these I have noticed in connexion with the second plea, and by it, in the event of a casualty, and repairs to the ship made by the defendants, any expenditure thereon exceeding the proportion for which they were liable, *including the premium note, if unpaid, should be a lien upon the vessel*. The other, which declares that losses should be paid in sixty days after the proper proofs were given, also provides that the amount of the premium note, if unpaid, is to be first deducted—a provision apparently fitted to the present case. I think, therefore, this plea is bad.

Judgment for plaintiff on the demurrers to the second and fifth pleas, and for defendants on the third and fourth pleas.

*Per cur.*—Judgment accordingly.

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## CHISHOLM V. GREAT WESTERN RAILWAY COMPANY.

*Railway—Running of locomotives—Destruction of fillies by—Pleading.*

The plaintiff stated specially a cause of action to have accrued before the passing of the stat. 20 Vic. ch. 12, and alleged a duty in the defendants to erect and maintain sufficient fences on the line of the route of their railway, and charged a breach of that duty in neglecting to erect and maintain such fences; by means whereof certain fillies or colts of plaintiff, one of which was lawfully in a certain close near the railway, and the other was lawfully on the highway near the railway, by and through the defendants' breach of duty, got upon the railway, and by means thereof, and by and through the negligence of the defendant's in running and propelling their locomotive engines, and while the said fillies or colts were so upon the railway, a locomotive of defendants ran against them, &c.

*Held* that all the allegations respecting the duty of the defendants to fence, and their breach of that duty, by which plaintiff's fillies got on the railway, being struck out, the declaration in alleging negligence on the defendants' part in running and propelling their locomotives still disclosed a good cause of action.

APPEAL from the County Court of the County of Worth.

The declaration stated that defendants were long before, and at the time of the grievances continued to be, the possessors of a certain railway, &c., by reason whereof it became and was their duty to erect and maintain sufficient fences on the line of the route of said railway.

*Averment* that although a sufficient time for such erection had elapsed, yet defendants had disregarded their duty, &c., and a certain filly or colt of plaintiff lawfully being in and upon a certain highway, and a certain other filly or colt lawfully being in and upon a certain close adjoining the line of said railway, strayed and got upon the track of the said railway, and by means thereof, and through the negligence and carelessness of the defendants and their servants and agents, in running and propelling their locomotive engines and cars on said railway afterwards and before the 27th of May 1857, a locomotive engine, &c.

To which the defendants demurred on the following grounds—

That the said declaration attempted to fasten a duty upon the defendants to fence their railway as against all the world, by reason of their being the proprietors of the therein mentioned railway, and of their driving and propelling loco-

motive steam engines, &c., thereupon ; whereas no such duty exists, it being only as against the owners and occupiers of lands adjoining the railway that they are bound to fence.

And because the said declaration did not show that the colt or filly alleged to have been in the Queen's public highway was lawfully thereon.

That although the said highway may be near to the said railway, *non constat* that it abuts or is adjacent to the railway ; and because the said declaration did not show how the colt or filly alleged to have been in a certain close near to the railway was lawfully in and upon the said close, and that although the plaintiff's colt or filly may have been lawfully in a close near the railway, *non constat* that it strayed to a point along the route of the railway, at which point the defendants were bound to fence ; and because it was not shown that either of the said colts or fillies was lawfully upon the land from which it strayed and escaped on to and upon the defendants' said railway.

And because it was not sufficiently alleged in the said declaration that either of the said colts or fillies had a right to be on the said railway at the time when, &c., and if they had no right to be on the said railway there is no neglect of duty upon the part of the defendants sufficiently alleged, nor are there any facts sufficiently stated shewing the neglect of any duty upon the part of the defendants to support this action.

Joinder in demurrer.

Judgment having been given for the defendants on all the grounds of demurrer in the court below, except the first, the plaintiff appealed therefrom on the following grounds:—

1st. That the plaintiff's declaration was sufficient in law ; that the facts and circumstances necessary to render the defendants liable to the action, and admitted by the demurrer, are stated with sufficient certainty, and at least with certainty to a certain intent in general, and it was unnecessary to state them more particularly or more in detail, that being matter of evidence, which need not and ought not by good pleading to appear on the record.

2nd. That the several grounds of demurrer on which judgment was given for the defendants are not even good

grounds of special demurrer; but if they were sufficient for special demurrer, special demurrers are not allowed by law.

3rd. That the second ground of demurrer did not exist in the declaration, it being expressly stated in the declaration and admitted by the demurrer that the plaintiff's filly was lawfully on the highway.

4th. As to the third ground of demurrer, the plaintiff contended that it was not necessary that the highway abuts or is adjacent to the railway; it would be sufficient if it were within a foot or an inch, or a fraction of an inch, from it; and whether or not it was so near to it, or so situated in respect to it as to render the defendants liable or otherwise under the circumstances, was a matter of evidence to be proved on the trial.

5th. As to the fourth ground of demurrer, the plaintiff said it was not necessary to state *how* the filly was lawfully in the close. The declaration alleged, and the demurrer admitted, that it was lawfully there.

6th. As to the fifth ground of demurrer, the plaintiff said it did not exist in the declaration. It was stated with sufficient certainty, and admitted by the demurrer, that for want of *such* fences as the defendants were bound to make and maintain along the line of the route of their railway the filly got upon the railway from the said close.

7th. As to the sixth ground of demurrer, the plaintiff said it does not exist in the declaration.

8th. As to the seventh ground of demurrer, the plaintiff said it is no sufficient ground for demurrer. That it was sufficiently stated in the declaration, and admitted by the demurrer, that the plaintiff's fillies were lawfully, one on the highway near to the railway, and the other in a close near to the railway, and escaped thence on the railway for want of such sufficient fences as the defendants were bound to make and maintain there, and that not only by means of the defendants' negligence in not making and maintaining such fences, but also by means of the defendants' negligence in running and propelling their locomotive engines, &c., the fillies were killed; that if it were not admitted, or if the plaintiff failed to prove that the fillies came on the railway

merely through the defendants' neglect to make and maintain such fences as they were bound to make and maintain, yet if the defendants unnecessarily or wilfully, or by gross negligence in running or propelling their locomotive engines, &c., killed the plaintiff's fillies as is charged in the declaration, the defendants would still be liable to this action.

9th. And the plaintiff says that the defendants in this case are bound by law to make and maintain sufficient fences along the line of the route of their railway as against all the world, and not merely as against the owners and occupiers of land which their railway crosses, or which adjoins on the railway, as is the case in regard to certain other railway companies.

10th. And the plaintiff further says that the defendants' demurrer was too broad, and none of the grounds of their demurrer apply to the charge of negligence in the running or propelling of their locomotive engines, &c.

The case was argued by *O'Reilly*, Q. C., for appellant, citing *Fawcett v. York and N. Midland Ry. Co.*, 16 Q. B. 610; *Ricketts v. E. I. Dock, &c., Co.*, 12 C. B. 160; *Parnell v. G. W. R.*, 4 C. P. U. C. 517; *Renand v. G. W. R.*, 12 Q. B. 408; *Dobrey v. O. S. & H. Ry. Co.* 11 U. C. Q. B. 600; *Gillis v. G. W. Ry. Cy.*, 12 U. C. Q. B. 427.

*Irving*, for respondent, cited *Auger v. The Ontario, Simcoe, and Huron Railway Co.*, 9 C. P. U. C. 164.

DRAPER C. J.—The cause of action is specially stated in the declaration to have accrued before the 27th May 1857, and therefore before the 20th Vic., ch. 12, entitled "An Act for the better prevention of accidents on railways," was passed.

The declaration first alleges a duty in the defendants to erect and maintain sufficient fences on the line of the route of their railway, and charges a breach of that duty in neglecting to erect and maintain such fences, by means whereof certain fillies or colts of the plaintiff, one of which was lawfully in a certain close near the railway, and the other was lawfully on the highway near the railway, and through the

defendants' breach of duty got upon the railway, and by means thereof, and by and through the negligence of defendants in running and propelling their locomotive engines, and while the said fillies or colts were so upon the railway track, a locomotive of defendants ran against them, &c.

Suppose all the allegations respecting the duty of the defendants to fence, and their breach of such duty, by which plaintiff's fillies got upon the railway, were struck out, will the declaration still disclose a good cause of action.

We are of opinion that it will, and for this reason we give judgment in the plaintiff's favour. But for the allegation of negligence on the part of the defendants in running and propelling their locomotive engines we should have dismissed the appeal. We think the case otherwise is not distinguishable from that of *Gillis v. The Great Western Railway Co.*, 12 U. C. Q. B. 427, on which we have acted in this court.

If, however, apart from the alleged breach of duty to fence, and the allegations that the fillies and colts were lawfully, &c., plaintiff can establish negligence in the management and running the defendants' engines, from which cause the alleged injury has proceeded, he will have a right to recover. If, however, the fact should appear on a trial to be as they were asserted to be on the argument, there is little prospect of his ultimate success. In the meantime, however, we are of opinion that the judgment for the defendants on the demurrer should be reversed, and further, that judgment should be entered thereon for the plaintiff, unless the defendants before the end of the next county court term obtain leave to withdraw the demurrer and plead on such terms as the court below may think fit to impose.

*Per cur.*—Judgment reversed.

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The following gentlemen were called to the bar during this term:—

MALCOLM COLLIN CAMERON, ROBERT RUSSELL LOSCOMBE, WILLIAM DUCK, DAVID ANDERSON CREASOR, JOHN WEBSTER HANCOCK, SAMUEL COCKRANE JR., VERSCHOYLE CRONYN, JAMES FARQUHARSON MACLEOD, CHARLES HENDERSON SIMMS.

TRINITY TERM, 24 VICTORIA.

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Present:

The Hon. WILLIAM HENRY DRAPER, C. B., C. J.

„ „ WILLIAM BUELL RICHARDS, J.

„ „ JOHN HAWKINS HAGARTY, J.

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THE TRENT AND FRANKFORD ROAD COMPANY v. SCOTT  
MARSHALL.

*Bond—Action against surety for breach of—Pleading—Misnomer.*

A plea which stated that a bond (upon which the action was founded) was given for the due performance of the duties of the office of secretary and treasurer of the plaintiffs, and that before any breach occurred the party, as security for whom the bond was given, was appointed president and director of the said company,

*Held* bad, for not shewing that the offices of president and treasurer were incompatible as being under the Consolidated Statutes of Upper Canada, ch. 49, or otherwise; and admitting the offices to be incompatible, did the acceptance of the one as a consequence of law vacate the other?

2nd, that a plea stating that the co-bondsman (as surety for whom the defendant was sued) had ceased to be secretary and treasurer of the company at the time the bond was given, and had become a director and president, but that defendant did not know it.

*Held* to contain no answer to the action without the incorporation into and reading of the bond in the plea, which being done, the recital contained an admission under seal of his being duly appointed treasurer and secretary, and was therefore a contradiction thereof.

3rd, that a bond sued upon in the name of "The Trent and Frankford Road Company," which upon being produced was in the name of the "president and directors of the Trent and Frankford Road Company," came within the decision of the Brock District Council v. Bowen (7 U. C. Q. B. 471), and *In re* Hawkins (2 U. C. C. P. 72), and was sustainable.

DECLARATION—That defendant, on the 7th of December 1858, by his writing obligatory, acknowledged himself to be bound to plaintiffs, under the name of the president and directors of the Trent and Frankford Road Company, in the sum of \$1000.

*Pleas—1. Non est factum.*

2nd. That the bond was subject to a condition [after

reciting that John Smith, a co-obligee had been appointed secretary and treasurer of the Trent and Frankford Road Company for one year from the date (7th of December 1858), and from thence until the next meeting of the directors which might be held after the year] that if Smith should, during the continuance of his appointment, perform the duties of secretary and treasurer, and promptly pay over all moneys that might come to his hands as treasurer, agreeably to the orders from time to time of the president and directors of the company, and should deliver up all books, bonds, papers, or securities belonging to the company whenever called upon, and render a just and true account of all matters appertaining to the office of secretary and treasurer, the obligation should be void; that the said John Smith performed all the conditions of the bond on his part, as secretary and treasurer, to be performed.

3rd. That Smith was appointed secretary and treasurer before the making of the bond; that after such appointment and before any default the directors of the company elected and appointed him to the office of president, and that he accepted the office of president, and continued to act in such office until the commencement of the suit. That Smith, at the time of his election to be president, was a director of the company, elected by the stockholders, and that being such director, he was, as aforesaid, elected president, and that by virtue of the appointment to the office of president, and of his election to the office of director, and before any default made by Smith in the condition of the bond, "which said condition is set out in the plea of the defendant next above pleaded," Smith ceased to be secretary and treasurer, and that by reason of his election and appointment as director and president, and his acceptance thereof, and by reason of the incompatibility of the said office with the offices of treasurer and secretary, Smith ceased to be treasurer and secretary, and defendant was discharged.

4th. That after Smith "in said writing obligatory in the said declaration, and in the second plea mentioned," was appointed secretary and treasurer, the directors of the company resolved to abolish those offices, and the shareholders

elected Smith a director, and the directors elected him president, and that before the making of the said writing obligatory he ceased to be secretary and treasurer without the knowledge of the defendant, and that the defendant was ignorant of that fact at the time of the execution of the said writing obligatory, and that from the time of such execution Smith was not, nor hath been, secretary and treasurer, and at the date of the writing obligatory Smith was, and continued to be, director and president hitherto, and after the date of the writing obligatory he was not appointed treasurer or secretary.

*Demurrer* to the third plea—that it did not shew performance, and set up matter of discharge which is no discharge in law.

*Demurrer* to the fourth plea—that it did not shew performance during the year of office of Smith, and set up matter of discharge which is no discharge in law.

The plaintiff also joined issue on the defendant's pleas, and assigned as a breach of the condition that after the making of the bond and the appointment of Smith as treasurer as in the said bond mentioned, and during his continuance in office as in the said bond mentioned, money to the amount of \$1500 came into the hands of Smith as such treasurer, for the use of the plaintiffs, yet Smith did not account for the same.

The defendant joined in demurrer.

“And as to the replication of the plaintiff to defendant's second plea,” defendant says that none of the said moneys were received by Smith as such treasurer, nor were they received while he was in office as treasurer, and defendant, by reason of the facts alleged in the third and fourth pleas, was, before the receipt of the moneys, discharged from the bond and condition.

The case was tried at Cobourg in March 1860 before Sir *J. B. Robinson*, C. J. The plaintiffs proved the bond, with the condition as set out in the second plea. Defendant was described in the bond as a surety, and the bond was to the president and directors of the Trent and Frankford Road Company. It appeared that when the bond was

executed there was a balance of £36, 4s. 4d. in Smith's hands; he had been treasurer in 1853, and from that time until the bond sued upon was given. On the 7th December 1858, the day the bond bore date, Smith was elected a director and president of the company. The bond was not executed until after Smith had become president of the company, and until after the meeting of the directors on the 9th of December.

Two witnesses were called who were directors of the company, and whose evidence was on that account objected to. From their testimony it appeared that the company had procured the loan of a debenture from the municipality of the county of Hastings for their use, and had undertaken to pay it when it fell due in 1859. For this purpose Smith made his promissory note for \$600, dated the 1st of August 1859, in favour of Allan Way, who was a director, and he and one McColl, also a director, endorsed this note. Smith got it discounted at the agency of the Commercial Bank at Belleville, saying it was for the plaintiffs; that it was wanted for persons who had done work on the plaintiffs' road. The bank discounted the note on the credit of the names upon it, and Smith got the money. It was at Smith's suggestion the money was thus raised, and he got the other two directors to endorse it to raise a part of the money wanted to pay off the debenture, the residue being to be provided from funds of the company. Smith absconded very shortly after getting the proceeds of this note. This note was taken up, \$200 being paid from the company's funds, and a new note for \$400 given by Benjamin Way, who succeeded Smith as president, which was also endorsed by Allan Way and McColl, and this was renewed, paying \$150 from the company's funds, and a new note given for the balance. Smith's account was charged with these two items, the defendant disputing his liability on either, under the particular circumstances. Peterson, the other surety on this bond, swore that he knew nothing of Smith's being president until after he went away.

Another bond was put in evidence, dated the 26th of March 1858, made by Smith and two sureties, conditioned

for Smith's faithful accounting for all moneys, &c., that should come to his hands belonging to the plaintiffs, and generally for his performing the duties and trust of treasurer to the plaintiffs. Nothing in this bond or the condition thereof shewed the appointment of treasurer to be annual or limited in duration. The present defendant was one of Smith's sureties on that bond.

A resolution was passed at the annual meeting of the stockholders of the company on the 7th of December 1858, as follows:—"That John Smith be a director for the ensuing year." The entry in the minute book proceeds thus: "It was deemed advisable to abolish the office of secretary and treasurer;" and at the meeting of the newly-elected directors held on the same day John Smith was elected president of the company, and the meeting was adjourned to take into consideration the suggestion recommended by the shareholders, and at the adjourned meeting of directors on the 9th of December the minutes of the annual meeting were read and approved, but it was resolved that the tolls, as soon as received by the president, should be deposited in the bank, &c. And on the same day it was resolved that the president be required to put in a fresh bond for security of his office as treasurer.

Evidence was also given that Smith had received since the 9th of December 1858 moneys of the plaintiffs to the amount of £81, 16s., independently of the two sums of £36, 4s. 4d. and £147, 5s., the proceeds of the discount of the note, for which he had not accounted.

It was agreed that a verdict should be taken for the plaintiffs for this sum, reserving leave to defendant to move to enter a verdict for himself or a nonsuit, and to raise any objections to the plaintiffs' right to recover this amount which might arise on the whole case, and reserving leave to the plaintiffs to move to increase the verdict by either or both sums of £36, 4s. 4d. and £147, 5s.

Cross-rules *nisi* were accordingly obtained in Easter Term, which were argued together with the demurrer by *J. H. Cameron*, Q. C., for plaintiffs, and *Bell* (of Belleville) for the defendant.

For the plaintiffs were cited *Gabriel v. Clerke*, Cro. El. 76; *Crane v. Holland*, Cro. Car. 138; *Hammond v. Peacock*, 1 Exch. 42.

For defendant—*Rex v. Haughley*, 4 B. & Ad. 650; *Rex v. Patteson*, 4 B. & Ad. 9; *Staniland v. Hopkins*, 9 M. & W. 178; *Rex v. Patemen*, 2 T. R. 777.

DRAPER, C. J.—As to the demurrer, the defence set up in the third plea is, that while Smith was secretary and treasurer, and before any breach of the condition of the bond, he was elected a director by the stockholders, and was appointed president by the directors of the company, and accepted both these offices, and by reason of such election, appointment, and acceptance, and of the incompatibility of the said latter offices with the office of treasurer and secretary, he ceased to be treasurer and secretary, and so defendant was discharged.

We cannot know anything of the nature and duties of these different offices of president, director, treasurer or secretary, excepting so far as we can derive information from the record. The action was brought by the Trent and Frankford Road Company. The right to sue in that name as if a corporation is admitted by this plea. The defendant not only does not dispute it, but he sets out a bond, which he alleges is the bond declared upon, and in which there is a similar admission. Still, there is nothing on the record to shew us that the plaintiffs are incorporated under the provincial statute (Consol. Stats. U. C. ch. 49). We cannot tell that they were not incorporated by royal charter or by private act of parliament. We gather from the record that they are a corporation, but do not know that they are a public corporation, and we have no judicial knowledge of any peculiar rights or privileges or of any law or rule applicable to them not applicable to all corporations as necessary incidents. The statute just referred to is a public act, but the record does not tell us that this corporation is in existence by its authority, and therefore subject to its provisions. I do not therefore feel at liberty to apply to it those sections of the

act which afford ground for maintaining that the office of treasurer is incompatible with that of president, and as without some such aid I cannot intend that such is the case, I conclude, therefore, that this plea is bad for want of shewing wherein the alleged incompatibility consists. Even admitting that these offices are incompatible, it would remain to be considered whether the acceptance of the offices of director and president did vacate that of treasurer, which Smith, as the plea states and the demurrer admits, then held. As at present advised, I think that *under the statute* such would be the consequence, because Smith could have put an end to his being treasurer simply by his own act, and the directors could have accepted his resignation of that office in order to make him president. The case of *Worth v. Newton* (10 Exch. 247), and the authorities therein referred to, seem to establish this conclusion. But for the reason given, that the incompatibility of the two offices relied upon by the defendant is not shewn to exist, I think the plaintiffs entitled to judgment on the demurrer to this plea.

The gist of the defence set up in the fourth plea appears to me to be, that Smith had ceased to be before and was not treasurer at the time when defender executed this bond as his surety, but that the defender did not know it. I do not understand the plea to raise the question, that because Smith was elected director and appointed president, therefore he ceased to be treasurer. I think this plea bad. Unless the bond and condition, as set out in the second plea, are read as incorporated in this plea, it is clearly no answer, and if they are so read, the condition contains an admission under seal on the defendant's part that at the time of making the bond Smith had been duly appointed by the plaintiffs as their treasurer, and I do not think the defendant can be heard to deny that fact, though he might shew that immediately after the execution of the bond Smith had ceased to hold that office. Even then it should be averred that there had been no breach of the condition during the interval between the making of the bond and Smith's vacating the office. I think, therefore, the plaintiffs are entitled to judgment on the demurrer to this plea.

We have then to deal with the issues of fact. The first point is the variance.

At the trial it appeared the bond was proved, and by it the defendant became bound to the president and directors of the Trent and Frankford Road Company, whereas this action is brought by the Trent and Frankford Road Company. The decisions in *The Brock District Council v. Bowen* (7 U. C. Q. B. 471), and *In re Hawkins* (2 U. C. C. P. 72), in both which the English authorities are referred to and considered, afford a complete answer to the defendant's objection, and render it unnecessary to discuss it.

Then it was proved that the bond, though bearing date on the 7th of December 1858, was not in fact executed until the 9th of that month. At the annual meeting of the stockholders on the 7th they had suggested to the directors the expediency of abolishing the office of secretary and treasurer, and at the meeting of the directors on the 9th the minutes of the meeting of the stockholders were read and approved; but I rather interpret this as a confirmation of the correctness of the entry than as an adoption of the suggestion, for on the 7th they first elected Smith to be their president, and then postponed the consideration of the suggestion; and at their next meeting on the 9th they required the president to put in a new bond for security of office as treasurer, and the bond now in suit was executed, as I understand the evidence, in pursuance of that determination. The minutes shew no resolution to abolish the office of treasurer, but without so resolving in express terms the directors added the duties of the treasurer to those of president, and required and took security for the performance of the duties of the former office.

If therefore the third plea were good in law, it would be untrue in fact in a material point, namely, that Smith, after his appointment as treasurer, and before any default in the condition of the bond, was made director and president, for I think the effect of the whole evidence is, that being director and president, he was also made treasurer, and was, when president, and *eo nomine*, required to give a new bond for security of "his office as treasurer." Admit-

ting, as I think may, and perhaps must, be admitted, that his office of treasurer was vacated on the 7th of December, there is evidence of a new appointment on the 9th, in pursuance of which this bond was given. And in like manner the allegation in the fourth plea that at and after the execution of the bond Smith was not treasurer is, in fact, untrue.

That Smith was guilty of a breach of duty and violated the condition of the bond was abundantly proved, and I see no ground for disturbing the verdict given on the application of the defendant. As to the plaintiffs' rule to increase the verdict by the sum of £36, 4s. 4d., I am of opinion it should be made absolute. It was a balance brought forward by him from the preceding year, and remained in his hands as treasurer under the new appointment. The other sum of £147, 5s. seems to have been money raised by Smith on a promissory note endorsed by two other parties for the use of the plaintiffs; not money coming into his hands in the ordinary and regular course of his dealing as treasurer. The plaintiffs' counsel almost conceded that this sum was not recoverable against the defendant as Smith's surety, and I think he was right in not pressing it. As to so much, we ought not, I think, to grant the plaintiffs' rule.

The defendant's rule will therefore be discharged, and the plaintiffs' rule made absolute to increase the verdict by the sum of £36, 4s. 4d.

Rule absolute accordingly.

See *Mayor, &c., of Cambridge v. Dennis*, 5 Jurist, N. S. 265; *Worth v. Newton*, 10 Exch. 247; *Holland v. Lea*, 9 Exch. 430; *Kitson v. Julien*, 4 E. & B. 854; *Mayor of Berwick v. Oswald*, 1 E. & B. 295; *Oswald v. Mayor of Berwick*, In Error, 3 E. & B. 553; S. C., 2 Jur. N. S. 743; *Rex v. Tazzard*, 9 B. & C. 418; *R. v. Patterson*, 4 B. & Ad. 9; *Stanilund v. Hopkins*, 9 M. & W. 178; *Milward v. Thatcher*, 2 T. R. 81; *R. v. Hughes*, 5 B. & C. 886; *R. v. Hopkins*, 1 Q. B. 161.

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## JOHN WASHINGTON WALLACE V. JAMES ADAMSON.

*Alien—Forfeiture of estates by—Under statute 54 Geo. 3rd, ch. 9—Crown.*

Where a party who owned real estate in more counties than one, and voluntarily left Upper Canada in 1812 to reside in a foreign country,

*Held* that under the statute 54 Geo. 3rd, ch. 9, it was not necessary to appoint a commission to enquire into the facts in more than one county, and a commission being issued to one county, which was not traversed within the time allowed by law, and which declared the party, into whose *status* it was issued to enquire, to be an alien under the terms of the statute, all lands in Upper Canada became thereby forfeited.

*Held* also, that the ancestor of the plaintiff, through whom he claimed by devise, being under the circumstances above-mentioned declared an alien, he was unable to hold land within the province, and could not therefore devise the same, and that his lands upon office found became vested in the crown.

EJECTMENT for lot No. 31, concession No. 1, west of the Grand River, township of Woolwich; defence for the whole. The plaintiff claimed title as devisee of William Wallace, deceased, the grantee of the Crown, and by a conveyance or quit claim from the other devisees of William Wallace. The defendant, besides denying the title of the plaintiff, claimed title under a deed from James McConachie to himself and one George Adamson, and also by length of adverse possession.

The case was tried at Stratford in April 1860 before *McLean, J.* The plaintiff put in a patent, dated 5th February 1798, to William Wallace, for block No. 3 on the Grand River, containing 86,078 acres, for a consideration of £16,364, secured to be paid to the Hon. D. W. Smith, Capt. W. Claus, and Alex. Stewart, Esq. in trust for the chiefs, warriors, and people of the Mohawk or Five Nations, as an equivalent for so much of the said lands surrendered and relinquished by them. Block No. 3 afterwards became the township of Woolwich, and part of that township was subsequently formed into a separate township as the township of Pilkington. On the margin of the official copy of the description for patent the word "impounded" was written, and there was an order in council (a copy whereof, duly certified, was put in), dated the 24th of June 1803, directing the patent to be impounded.

The plaintiff then gave evidence to shew that the grantee of the Crown, William Wallace, was his father, and he put in

the last will of the said William Wallace, who died in 1823, dated the 24th of August 1813, at Niagara, devising all his property to his children, and gave evidence of who the children were, and produced a conveyance dated the 15th of October 1858 from the others of the children of William Wallace to himself in fee, the execution of which conveyance was admitted. This was the plaintiff's case.

For the defendant it was objected that it was not shewn that the plaintiff or anyone under whom he claimed had been in possession since 1814. That if in possession then, the possession was abandoned and forty years had run since, wherefore by the Statute of Limitations as to real property the plaintiff's right of entry was barred.

It appeared on the cross examination of the plaintiff's witnesses that William Wallace lived in Niagara as long ago as 1796. He was by trade a carpenter, but he carried on a large brewery at Niagara, and he was living there in 1813 when the American army held possession of that place. In 1814, the fall after the evacuation of Niagara by the American army, he was living at Rochester, in the State of New York.

The defendant put in evidence from the office of the Clerk of the Crown and Pleas for the Court of Queen's Bench in Upper Canada a record of proceedings had under the 54th Geo. III., ch. 9, entitled "An act to declare certain persons therein described aliens, and to vest their estates in His Majesty." This record contained *first* a commission under the great seal of the province of Upper Canada, dated the 2nd of May 1815, addressed to Jos. Edwards, Abraham Nelles, and William Crooks, all of the district of Niagara, Esquires, or to any one of them; and after reciting the above mentioned act, it appointed them commissioner or commissioners under the act for the Niagara district, giving them power to enquire by the oath of twelve men, &c., whether William Wallace, late of the town of Niagara, in the district of Niagara, brewer, formerly an inhabitant of the United States, claiming to be the King's subject, and renewing his allegiance as such by oath, having received a grant of land from the Crown, or having become seised of lands

within the province, to wit, in the said district of Niagara, by inheritance or otherwise, had voluntarily withdrawn himself from the province into the United States since the 1st of July 1812, or during the war with the United States, without license from the Governor, &c. ; and if he shall have so withdrawn himself without such license, then in like manner to enquire what lands were in the seisin of the said William Wallace on the 12th of July 1812, and commanded them, or any of them, to make an inquisition or inquisitions of the premises, and the inquisitions so made to return into the Court of Queen's Bench with the writ.

2nd. An inquisition indented, taken at the township of Grantham, in the Niagara district, on the 27th of May 1816, before Abraham Nelles, Esquire, Commissioner, by virtue of, &c. (the foregoing commission), by the oath of, &c., good and lawful men of the district of Niagara, who being sworn of an upon the premises, on their oath say that the said Wm. Wallace, in the said commission named, formerly an inhabitant of the United States of America, &c. (as in the commission), did, since the 1st of July 1812, and before the conclusion of the late war, voluntarily withdraw himself from the said province into the United States, without license granted, &c. And that the said William Wallace was on the 12th of July 1812 seised in his demesne as of fee of a certain parcel, &c., being lots No. 9, 10, 11, and 12 in the town of Niagara, and of a certain parcel of land in the Home District containing by admeasurement 7000 acres, being part of block No. 3 of the Indian land on the Grand River, being a triangular block lying on the east side of the said river opposite the forks thereof in block No. 3 ; and that he had no other lands.

3rd. A deed, dated the 6th of November 1821, from the Commissioners of Forfeited Estates to William Crooks, consideration £1225, reciting the statutes, and the inquisition finding William Wallace seised of the lands mentioned in the deed, which contained 7048 acres, and were particularly described by metes and bounds.

A surveyor was called who had surveyed the premises, and produced a map or plan thereof. He stated that the

defendant's land was on the west part of the tract known as the Crook's tract; that it lies west of one branch of the Grand River, and east of the south-west branch; that the tract would not contain 7048 acres on the east side of the Grand River. The witness thought at least a quarter of it was on the west side of the Grand River, as now designated, but the whole tract was on the east side of that branch now called the Canestoga Creek, or south-west branch of the Grand River; that there were several small streams running into the Grand River, one called the Canadagua, or some such name, near the tract called the Wallace tract. The defendant's lot is about  $4\frac{1}{2}$  miles distance from the western boundary of Woolwich. The Canestoga turned to the north in the township of Wellesley; the witness could not tell at what distance from defendant's land. On the plan were marked the distances as taken from the memorial of the deed from Wm. Crooks. Another witness gave evidence that one McConachie settled on this lot in 1839 or before, and made a clearing and remained till about four years ago, when the defendant entered. There are now about 70 acres cleared. A deed was put in, dated the 31st of March 1856, for the lot in question, to James Adamson and George Adamson, consideration \$4250.

It was agreed that the question of fact, whether the lands lay east or west of the Grand River, should be left to the jury, and that a verdict should be entered for defendant, with leave to the plaintiff to move to enter a verdict for him on the finding of the jury, and the questions arising on the law and evidence in the course of the trial. The jury found that the land was east of the Grand River.

In Easter Term *C. S. Patterson* obtained a rule *nisi* to enter a verdict for the plaintiff on the leave reserved, and on the ground that the plaintiff proved title in himself under his father, the patentee of the Crown, and that nothing was shewn sufficient in law to divest the patentee or the plaintiff of such title, or for a new trial, on the ground that the verdict was against law and evidence and was perverse inasmuch as the jury have found that the land in dispute is on the east side of the Grand River, whereas it is in fact, and

it was proved to be, on the west side of the Grand River; and because the verdict was influenced by the prejudice of the jury against the plaintiff, and was based upon opinions formed before the trial, and not on the evidence, and on grounds disclosed in affidavits filed, which stated that one of the jury had before the trial stated his feeling to be adverse to the plaintiff, and that one deponent thought an impartial trial could not be had in the county of Perth.

*Eccles*, Q.C., and *M. C. Cameron* shewed cause. They cited *Attorney-General v. Duplessis*, Parker, 144; Co. Lit. 2 b.; *Doe Macdonald v. Cleveland*, 6 O. S., U. C. 117; Page's case, 5 Rep. 52 b.; *Jarman on Wills*, 34; *Touchstone*, 404; *Doe v. Davis*, 5 O. S., U. C. 494; Co. Lit. 129; 4 Leon. 84; *Bac. Abr. Alien, C., Chit. Prerog.*, 249, 322; *Com. Dig., Alien, C.* 7; *Doe v. McDonnell*, *Dra. Rep.* 386.

*A. Wilson*, Q. C., and *C. S. Patterson*, contra, referred to *Stat. of U. C.* 54 Geo. III., ch. 9, 1 Leon. 47; *Stat.* 11 & 12 Wm. III. ch. 6; *Barrow v. Wadkin*, 3 Jur. N. S. 679; *Cro. El.* 855; *Moor.* 640; *Attorney-General v. Duplessis*, 2 Ves. 538-9; *Sheffield v. Ratcliffe*, *Hob.* 334; *Calvin's case*, 7 Co. 2 b.; Co. Lit. 31 b.; *Touchstone*, 235; *Davenport v. Davenport*, 7 C. P. U. C. 401.

DRAPER, C. J.—It seems singular that the patent granting these 86,078 acres to William Wallace should ever have been issued; for by the minute of council of the 24th of June 1803, approved by Lieut.-Governor Hunter, in reference to this and some other blocks of Indian lands, it appears that the grantees were purchasers, who were to give security for the purchase money, and for the annual payment of interest thereon, in order to provide by way of annuity a certain and permanent support for the Indians. The patent to Wallace bears date the 5th February 1798, and the minute states that no act whatever had been done by him towards carrying his contract into execution, nor had he given any security for the purchase money, and that he was not at that time (June 1803) considered of ability to pay the arrears or the future accruing interest. At that date the patent

was in the hands of the Executive Government; the minute distinctly states so, and recommends that he should be called upon forthwith to give the requisite security and pay up the arrears, or to relinquish all future claim to the block, and in the meantime it was recommended that the patent should be impounded in the council office until further orders. Perhaps the circumstances were such that it might be held the King was deceived in his grant, for no ground is afforded for surmising that any part of the arrears were paid, or any security given for the future, nor that any further orders were ever given, and the recital in the patent that Wallace had given security to the Hon. D. W. Smith, Capt. Claus, and Alex. Stuart for £16,364 seems to be a mistake. How it got out of the council office, whether by mistake, or neglect, or fraud, or surreptitiously, is not known, nor is any question of that nature before us; still it seems absurd that if in truth the patent was never properly issued, because conditions precedent to the grant were never fulfilled, that we should now be occupied in trying the questions raised, and which but for the assumed validity of the grant never could have arisen.

William Wallace was, however, according to what we see, a British subject, to whom the Crown made a grant of the land specified as block No. 3, &c. It is established also, by force of the inquisition returned, and of the stat. 54 Geo. III., that he became, and was in point of law, an alien born. I feel quite satisfied that the effect of this inquisition was not limited to establishing the fact of his alienage in the district into which the commission of enquiry issued, but generally in Upper Canada. I should have deemed it unnecessary to make any observation on this point, but it was more or less urged by the plaintiff's counsel that a commission of enquiry should have issued into every district in which he had lands, to enquire not merely as to what lands, but also as to the fact of alienage. If several concurrent commissions had been issued, very possibly they would have directed an enquiry as to both points, as was the case in the *Attorney-General v. Duplessis*, 2 Ves. 238. But after the return and filing of record of one inquisition, finding William Wallace

an alien, and there having been no traverse of that finding within the time allowed, I take it to be conclusively established, at least as against him and all claiming through or under him, that he was an alien.

The plaintiff sets up the seisin of William Wallace under the patent of 1798; that he died so seised in 1823, having by his last will devised this land. If as an alien he were incapable of devising, or if under the words of the statute he became, so soon as he was declared an alien within and according to its provisions, incapable of holding land within the province, the plaintiff's case fails. In the former case, because no one can take the land as heir to the alien; in the latter, because if he cannot hold, there will be the same reason for the freehold being cast upon the King, namely, that otherwise it would be in abeyance, as if he had died intestate; and wherever the possession is in law cast upon the King no office is necessary—4 Co. 58. Mr *Jarman* treats the devise of an alien of lands as voidable, and cites the case in 4 Leon. 8 (*Jarman on Wills*, 34), where it was held that an alien tenant in tail in possession might suffer a recovery, while he admits it to be clear that if the alien die intestate his land would escheat to the Crown without office. The former position is in direct conflict with a passage in the *Touchstone* to which he also refers. *Touchstone* 403. "An alien born" (meaning of course one who is neither naturalized nor made a denizen) "cannot make a testament of lands or goods," which, as to goods, is certainly not sustainable according to other authorities, unless instead of "alien born" we read "alien enemy." See 5 Rep. 111. The argument of the counsel for the Crown in *Fourdrin v. Gowdey* (3 Myl. & K. 383) seems opposed to Mr *Jarman's* view, and though the decision in that case was that the testator, who was an alien at the time that he acquired the freehold there in question, having afterwards obtained letters of denization, with a clause that he and his heirs might freely and lawfully claim, retain, and enjoy manor lands, tenements, rents, and hereditaments theretofore given, granted, or assigned to him, as fully as any liege subject born within the United Kingdom might or could, could devise, the judgment was grounded

entirely on the operation of this retrospective clause ; as to this case, however, see *Du Hourmelin v. Sheldon*, 4 My. & Cr. 525. In *Williams on Executors*, p. 11, the learned writer lays it down that alien friends may dispose of their personal estate, "although being incapable of holding real property they are of course equally so of devising it," and adds in a note, "this incapacity extends to chattels real," for which Co. Lit. 2 is cited, where it is said that if an alien die possessed of a lease for years of a house, neither his executors nor administrators shall have it, but the King. 1 Roll. Ab. 194, l. 23 ; 1 Anderson, 25 ; N. Bendl. 36 ; Poph. 36 ; Co. Lit. 42 b. Though a will is in the nature of a conveyance, yet it is wholly inoperative during the testator's life. Until the moment of his death no estate or seisin passes ; but at that same instant, if the alien died intestate, there is no doubt the estate would vest in the Crown without office, for no one can take by descent from an alien, and the freehold cannot be in abeyance. The title of the Crown and the devisee are thus conflicting, both accruing at the same instant, and the only consequence of giving priority to the devisee being that there must be an office to entitle the Crown as against him. There seems no reason whatever on the evidence for supposing that the devisees, or any of them, any more than William Wallace, were ever in possession of this land, if that would make any difference as to the necessity for an inquisition. In the absence of any clear authority, and considering that though devisees take as purchasers they are not purchasers for value, I cannot bring myself to the conclusion that the devise of the alien can operate to make a transfer of the estate after his death so as to interfere in any way with the right of the Crown.

But it is necessary also to consider the statute. The first section enacts that a certain class of persons, particularly defined, "shall be taken and considered to be aliens born and incapable of holding lands within the Province" of Upper Canada. The second section provides for ascertaining by inquisitions "all such persons as aforesaid who seised of lands in their respective districts shall have voluntarily withdrawn," &c. An alien born may, at common law, hold lands con-

veyed to him against anyone but the Crown, and he may convey and possibly (though I think not) devise ; but still, apart from the effect of particular statutes, the right of the Crown to lands so purchased by the alien continues, though they have passed into other hands. But he is incapable of holding for his own use and benefit. Why, then, were the words "incapable of holding lands" introduced? Mr *Wilson* strenuously argued that they are to be treated as merely declaratory, which is in effect treating them as superfluous. The legislature were not declaring the law as to aliens born, but were dealing with a class of persons who stood in the situation of natural born subjects, seised in fee of real estate in Upper Canada, residents in that province, who during the late war with the United States had voluntarily withdrawn from the province into the enemy's territory, and it declared that such persons should be taken and considered to be aliens born and incapable of holding lands within the province. They were persons capable of taking and holding as well as of conveying and transmitting lands until it was established that they formed part of this class, and the first and principal object of the inquisition provided for by the second section was to determine that question. But the moment it is found and placed on record that Wm. Wallace was formerly an inhabitant of the United States ; that he had claimed to be a subject of His Majesty Geo. III., and had renewed his allegiance as such by oath ; that he was seised of lands in Upper Canada ; and that after the 1st July 1812, and during the continuance of the war with the United States, he had, without license, voluntarily withdrawn from the province into those States, *eo instanti* he was divested of his character of a British subject, was in effect declared an alien born, and was made incapable of holding lands. The commissions were to be directed to commissioners for the several districts of Upper Canada to enquire by the oaths, &c., as to such parties. It was essential that the individual respecting whom the inquiry was made should have been seised of lands in the district wherein the inquisition was taken ; without this there would have been no jurisdiction for trying the first and principal question above stated,

and the commission is in this respect supported by the finding, for it issued into the Niagara district, and it was found that William Wallace was seised of lands therein. If it were important for the decision of this case, as at present advised, I should hold the legislature meant, that on its being determined that Wallace was an alien within the terms of the act, the freehold of any lands he held was immediately divested out of him, otherwise the words "incapable of holding lands" have no real signification. The office as regards the *status* of Wallace was an office of entitling, a necessary part of which was that he was seised of lands in the district into which the commission issued, beyond that it could have no greater effect than as an office of instruction.

The statute certainly does not in express terms limit the enquiry to lands within the district into which the commission is issued, and the commission, while directing enquiry whether William Wallace was seised of lands in the Niagara district, and was in other respects a party coming within the purview of the act, further directs an enquiry "what lands were in the seisin of the said William Wallace on the first day of July 1812." The inquisition finds everything necessary, both as to lands in the district of Niagara and as to other particulars, to fix on him the position of alien, and finds further that he was seised in his demesne as of fee in lands in the Home district containing 7000 acres, being part or parcel of block No. 3 of the Indian lands on the Grand River, being a triangular block lying on the east side of the said river, opposite the forks thereof in block No. 3. It is, I think, well established that in ordinary cases an inquisition or office of entitling must be taken and found in the county wherever the alien has lands in order to give the Crown title and possession; but it appears to me this statute contemplated a different course, and the commission is framed accordingly. William Wallace lived and owned lands in the district of Niagara,—the commission therefore issued into that district; he was under it found and declared to be an alien, and the inquisition found also, all the lands of which he was seised, of which lands the King, in the words of the act of 1814, became seised by virtue thereof.

If, therefore, the land claimed in this ejectment is part of that specified in the inquisition, it appears to me the plaintiff's case fails on either of these two grounds: first, that the devise by William Wallace was inoperative and void, and second, that the lands were vested in the Crown by force of the inquisition and the statute.

The question then becomes one of fact—are the premises sued for part of the 7000 acres forfeited?

There is no complaint of the manner in which this question was submitted to the jury. They were asked to say whether the land for which this ejectment is brought is part of block No. 3 granted to William Wallace, and part of that portion of it which is set forth and described in the inquisition as “a triangular block lying on the east side of the Grand River, opposite the forks thereof, in block No. 3.” According to the maps produced, the general course of the Grand River is from north to south, and this particular lot “No. 3, in concession No. 1, west of the Grand River,” as it is called in the writ, is on the west side of and does not touch the Grand River at all. The patent is for the whole of block No. 3. There is no doubt that this lot is within the limits of that grant. The inquisition finds that on the 1st of July 1812 Wm. Wallace was seised of a part of that block containing 7000 acres, being a “triangular block,” &c. As to the residue, part of it now forms the township of Pilkington, another part has been settled by Germans and other settlers, and there is a portion lying between these 7000 acres and the township of Pilkington which has apparently been otherwise disposed of.

The description given by the inquisition has three features—1st. The part of the block is said to be triangular. 2nd. It is east of the Grand River. 3rd. It is opposite the forks of the Grand River in block No. 3.

As to the first, the general form of the piece of land, embracing, according to the defendant's shewing, the 7000 acres, may be called triangular, though somewhat inaccurately. But the inaccuracy is the same whether the Grand River is made the western boundary or whether a part of it lies across and to the west of the Grand River; so that this

part of the description gives no help. The second feature of the description is at variance with the position of the lot in question, which clearly appears by the map to be on the west side of the Grand River, and which seems to be correctly designated as "No. 3, in the first concession west of the Grand River," and the map shews another first concession east of the Grand River. The answer given by the defendant is, that the Grand River has two branches at this place, one the principal branch, usually known and referred to as the Grand River, the other the south-west branch, commonly called the Canestoga River or Creek, which unites with the main branch at a short distance south of the lot in contest. This (so-called) south-west branch runs in a westerly direction, inclining a little to the north for several miles before it takes a decidedly north turn, so as to be to the west of the lot in dispute, and it would certainly be a very loose description of this lot to speak of it as on the "east side of the Grand River," when it lies very close to the western bank of the main branch of that river, and the Canestoga River passes wholly out of block No. 3 before it reaches sufficiently far north to place this lot due east of it. The inquisition was taken in 1816, and at that time one would imagine the locality was sufficiently well known.

Then, thirdly, there is the reference to the forks of the river. I understand this term "forks" to designate the meeting of two branches of the same stream, not the confluence of two distinct rivers; but the distinction is perhaps rather a verbal criticism than any substantial difference, because the confluence of two streams differently named would present nothing to distinguish it from the meeting of two streams which were called the one the main, the other the south-west branch of one river. In either case the term "forks" might be made use of. "Forked" is defined by Johnson as "opening into two or more parts," which would seem more applicable to a stream of one channel dividing into two or more, than to two streams rising from distinct sources uniting into one, which is, however, the sense in which the word "forks" applies in the present instance. Taken so to mean, it affords some colour for holding that

this lot is on the east side of the Grand River; but I cannot but think it a forced conclusion from the facts. It, however, receives some slight support from the circumstance that further up the river another stream called the north-western branch, and called also the Irvine River, falls into the main branch of the Grand River at or near Elora. (Smith's Canada, vol. 2, 109.) But if the case depended on this point of description—"the east side of the Grand River"—I should think it proper to submit it to another jury in order to have it more fully enquired into.

But it is admitted on all hands that this lot is part of block No. 3, mentioned in the patent of February 1798 as granted to William Wallace. The plaintiff claims title to it under William Wallace's will, and as in my opinion he fails on this point to establish a right to the possession of any land whereof William Wallace was seised on the 1st of July 1812, I am of opinion this rule should be discharged.

RICHARDS, J.—Although in several text books it is declared that the devisee of lands under the will of an alien or felon may take the same until office found, yet it appears to me that the better opinion is that the will cannot pass any interest to the devisees as to lands held by the alien under a conveyance, and which at the time of his death were not in his possession, or the possession of any other person under him. I think on the death of the alien the Crown would take and would be in possession under its prerogative rights without office found or formal entry.

The case of the defendant here, however, seems stronger, for the Crown did so far go into possession of all the land as to make a grant of it, and in that view was in possession before the death of the testator.

I am also of opinion that under the Prov. Stats. on this subject, all taken together, the title to the land returned to and sold and conveyed by the commissioners is good in the hands of the purchaser, and therefore on this ground the plaintiff's case fails.

I also incline to the opinion that the finding of the jury as to the fact of Wallace being an alien under the statute

is all the finding necessary to constitute an office of entitling; and that as to the lands in any other district not mentioned in the return, all that would be necessary would be an office of instruction, which of itself does not vest the land, but merely informs the Crown what the land was to which it was entitled. I think the weight of authority is in favour of the view that when the office of instruction is required, the estate would vest in the Crown on the death of the party through whom the Crown claims, and if it so vests, then in this case the plaintiff cannot maintain his action.

I am therefore of opinion the defendant is entitled to judgment.

*Per cur.*—Rule discharged.

## THE EDINBURGH LIFE ASSURANCE COMPANY V. CLARK.

*Ejectment—Mortgage—Judgment in covenant thereon—How far it acts as an estoppel in ejectment.*

*Held* that the recovery of a judgment in an action of covenant upon a mortgage on pleas of "*non est factum*," and that he was not indebted as alleged and payment before action, did not stop the defendant from impeaching the same mortgage in an action of ejectment subsequently brought thereon on the ground of usury.

EJECTMENT for part of village lot No. 2, in the village of Brampton, laid out on lot No. 5, in the first concession west of Hurontario Street, in the township of Chingacousy, according to a plan drawn by J. S. Dennis, Provincial Land Surveyor, particularly described by metes and bounds, except so much of the described premises as is covered by a house erected thereon by William Marshal as his dwelling-house, and a space of one foot additional along the wall or end of said house, and along the back thereof. Writ tested 14th March 1860. Defence for the whole.

The trial took place in April last at Toronto, before *Hagarty, J.* The plaintiffs put in a mortgage in fee from the defendant to themselves of the premises in question, dated 10th November 1857, to secure to them the payment of £434, 12s. sterling money of Great Britain on 10th November 1860, and interest half-yearly in advance from

the date on every 10th November and 10th May after the date, at the rate of 6 per cent. per annum, the first half-yearly payment of interest to be made on the day of the date of the mortgage; and it was thereby further agreed between defendant and plaintiffs that on any default or breach by the defendant of the performance of any covenant or agreement in the said deed contained, the principal sum of £434, 12s. sterling, with interest at the rate aforesaid, should become due and be forthwith payable by defendant to plaintiffs. They also put in an exemplification of a judgment in the Queen's Bench, entered 20th June 1858, in an action of covenant on the same mortgage for £588, 14s. 4d. damages and £17, 13s. 6d. costs.

The defendant offered evidence to invalidate this mortgage on the ground of usury. It was objected that he was estopped by the judgment, and the learned judge so ruled, and the plaintiffs had a verdict.

In Easter term *McMichael* obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law and evidence, and for misdirection and improper rejection of evidence offered to impeach the verdict. *Hitchin v. Campbell*, 2 Bl. 830; *Right v. Bucknell*, 2 B. & Ad. 278.

*Read*, Q. C., shewed cause, citing *Cleve v. Powell*, 1 M. & Rob. 228; *Carter v. James*, 13 M. & W. 138. *Outram v. Morewood*, 3 Ea. 346; *Duchess of Kingston's case*, 2 Sm. Lead. Ca. 624.

DRAPER, C. J.—Upon examination of the record of judgment recovered by the plaintiffs against the defendant, it appears that the plaintiffs then sued for the half-year's interest due on the 10th May 1858, and for the sum of £34, 13s. 2d. sterling, which the defendant by the same deed covenanted to pay to the plaintiffs on the 12th September 1858, and they claimed the principal money, £434, 12s., by reason of the default in not paying the interest and the sum of £34, 13s. 2d., which was stated to be for premium upon a life policy granted to the defendant by the plaintiffs, and more particularly referred to in the mortgage deed. To the declaration setting out these breaches of covenant the de-

fendant pleaded *non est factum*, that he was not indebted as alleged, and payment before action brought.

The jury found for the plaintiffs on each of these issues, and the judgment was entered for the full amount claimed.

The defendant on the trial of this ejectment for the mortgaged land desired to impeach the deed for usury. It was urged that this record estopped him. If so, it must be because he did not raise the question of usury when he had the opportunity, for the record shews that usury was not in issue, and neither verdict nor judgment has been rendered on that question.

It appears to me the defendant was not so estopped. In the language of *Alderson*, B., in *Carter v. James*, 13 M. & W. 147 (changing the word plaintiff for defendant), if the defendant "were to be deemed estopped now, when the point now in issue was not raised at all in the former suit, he would be deemed estopped by the finding of a matter which he never disputed, and on which the jury gave no verdict and the court no judgment."

The defendant in the former action of covenant certainly, and we must take it advisedly, forbore to put in issue the question whether this mortgage was tainted with usury. He set up by that plea admitting the mortgage that he had paid the money secured. In *Carter v. James* the defendant pleaded that a bond sued upon was given in pursuance of a usurious agreement. The plaintiff traversed the allegation that the bond was so given, not traversing the allegation that there had been a usurious agreement. Still in an action on a mortgage for the same sum as the bond was given to secure, the court held that the plaintiff was not estopped from contesting the usurious agreement which was now pleaded as having been established by the former verdict, because they said that question had not been directly put in issue, and was not found by the jury, and that the admission of it by not putting it in issue in the former suit was an admission not binding on the plaintiff except for the purposes of that suit. Here the defendant, for the purposes of the former suit, has admitted, though far less directly, that his defence was not that the mortgage was void for usury

but that he had paid the debt. I cannot see that he is thereby prevented from setting up the defence of usury in this ejectment founded on the same mortgage. It appears to me this falls within the principle of *Carter v. James*, and is quite distinct from that involved in *Outram v. Morewood*, where Lord *Ellenborough* said the question was whether an allegation on record upon which issue has been once taken and found, is, between the parties taking it and their privies, conclusive according to the finding thereof, so as to estop the parties respectively from again litigating that fact once so tried and found. Here the particular allegation never has been put on record, and consequently no issue has been taken, nor has there been any finding upon it. I do not see therefore how we can hold that the defendant is estopped.

I do not find any case like the present, in which the defendant after a judgment obtained against him in covenant, has contested the validity of the deed containing the covenant in another action brought *diverso intuitu* upon it; in which former action the deed has been established upon *non est factum*, while in the latter the defence is that the deed is void for usury. In the first action we see that the pleadings did not allow this defence to be given in evidence, for *non est factum* does not open the defence that the deed was voidable. See *Hob. 72, Cuddington v. Wilkins*; *Whelpdale's case*, 5 Co. 242 *a*; *Lord Bernard v. Saul*, Str. 498, Com. Dig. Pleader, 2 W. 23. So that to hold that this recovery estops the defendant from setting up the usury now is to hold that if a party omits to plead a defence to a deed in one form of action in which he might have pleaded it, he is thereby precluded from setting up the same defence in any other action founded on the same instrument. It is not the same thing to omit *giving evidence* upon an issue proved, as, for example, upon a plea of set-off; but it is very much, though not precisely the same case, as if a defendant having a right of set-off omits to plead it, and afterwards in another suit brought by the same plaintiff does plead it. It cannot, I apprehend, be questioned that he has the same right to do so as he has to bring an action against the former plaintiff for that which might have been made the subject of set-off, though he allowed the plaintiff

in the former suit to recover, withholding that defence, and relying on another (say payment, as in this case) on which he failed.

It is not an answer, I submit, to say that the plaintiff in the supposed case sues on two distinct causes of action, and that in the case now in judgment both actions are upon the same deed. For the same right is not in question in this which was in question in the former suit—that was to recover the debt, this to obtain possession of the land. If it be said that it is in effect allowing the defendant to impeach the former recovery, inasmuch as by that recovery the deed *transit in rem judicatam*, the answer seems to be that the objection proves too much if it means that the deed has passed into a record, for then the plaintiff should sue upon the record and not upon the deed, and if it means only that the right to recover the amount secured by the mortgage has so passed, then the question remains where it was, for the defendant's success in this action will have no effect upon the plaintiffs' former recovery. I admit readily the defendant cannot again deny his making the deed with all due formalities of execution, but I cannot agree that he may not confess the making, and then avoid the deed by force of the statutes against usury. Unless, therefore, an estoppel to deny the plaintiffs' right to the money is of necessity an estoppel to deny his right to the possession of the land, this evidence ought to have been received. I do not so understand the law, and therefore am of opinion there should be a new trial without costs.

HAGARTY, J.—If we apply to this question the tests suggested in the books, we may consider that the former judgment is no bar.

The same evidence that supported the issues joined in the first action clearly would not uphold the issue joined in the latter. The defence proposed in the latter clearly could not have been given as evidence on the pleadings in the former suit, &c. Therefore authority seems decidedly in favour of the defendant's right. But I think it right to point out the effect produced thereby in this case.

A conveyance of an estate is made for no other purpose than to secure repayment of a debt. If that debt be duly paid, the conveyance is avoided. The enjoyment of the estate by the grantee depends solely on the existence of the debt. If the debt secured was usurious, the conveyance is avoided by statute. In substance the debt is the principal matter; the land is conveyed merely as a security therefor.

The debt is claimed by the creditor expressly in the contract to pay contained in the instrument passing the estate. The debtor pleads that he made no such deed, and also that he has paid the claim; with full knowledge of his position and his rights he offers no other defence. His success in either point would have substantially defeated the conveyance; he fails on both grounds. The judgment of the court declares that it is his deed, and that he did not pay the money.

The fact, therefore, of his having made such a deed, and that he owes such a debt, are for ever conclusively established; he never can be heard denying either the one or the other. The debt, as a valid subsisting claim at the date of that judgment, can never be questioned. The creditor afterwards, having thus conclusively proved the existence of the debt, to secure which the estate was conveyed, seeks to enforce his security by ejectment. The debtor now says the debt was usurious and void, and as the estate was conveyed only to secure such usurious debt, it is void also by act of parliament.

The creditor answers—"My debt has been conclusively established by judgment against you, and you cannot now be heard saying that it was usurious, any more than you can be heard asserting that you paid it at a date prior to that judgment. Your only objection to the conveyance is that it is founded on an unlawful debt. The latter point has been settled for ever between us in my favour."

I can see no reason why the defendant might not offer the defence of duress as well as usury. After a former finding against him on *non est factum*, in such a case a court of justice has adjudged that the deed was duly executed, and was the deed of the grantor, and in a subsequent action between

the same parties, the grantor is to be heard proving that though his hand and seal be there the deed does not bind him, as he executed under threats and not of his own volition.

An action of covenant may be brought on a deed for an instalment of one sum stated to be payable at intervals to plaintiff. Defendant may plead *non est factum*, payment, duress, or a plea impeaching the debt as void for gaming or any specified illegal purpose. Judgment is entered against him. Next year a fresh action is brought for another instalment, and he pleads that the whole security is void for usury. According to the tests suggested he may do all this as I understand. If so, it is difficult to understand the meaning of such hacknied maxims as "*transit in rem judicatam*."

That the instrument is his deed, that he owed the debt of which the instalment was claimed, &c., all have passed into judgment against him. It might naturally be supposed that after this he could only be heard pleading a defence not re-opening questions of validity already settled, but consistent therewith, as, viz., that he had paid the instalment claimed, or some newly-arisen matter. But a rigid application of the tests and dicta will enable such a deed to be impeached between the same parties in many successive actions on special grounds of fraud, duress, infancy, coverture, usury, &c., &c. This appears to me to be a curious state of the law, eminently favourable to protracting litigation to indefinite extents.

I have not been able to find any case in which the same instrument was ever in one action held good against an issue denying its validity, and in a subsequent action between the same parties held void on a new ground of defence which might have been urged, and was not urged, in the previous contest.

The facts of the case of *Carter v. James*, and the result arrived at on the facts, do not remove my doubts or supply any solution of my difficulty.

I consider the language of V. C. *Wigram*, in *Henderson v. Henderson*, 3 Hare, 115, as suggesting a sound rule—" *Res judicata* applies not only to points upon which the

court was actually required by the parties to form and pronounce an opinion, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time."

But in *Barrs v. Jackson*, 1 Y. & C. 597, V. C. *Knight Bruce* says—"A judgment is final only for its own proper purpose and object. Supposing a case of a creditor's bill in equity by a simple contract creditor defeated on the ground of a general release, and admit the decree of dismissal to be final in this court as to the debt demanded, would it be conclusive in another suit by the same plaintiff, as a specialty creditor, so as to preclude him from denying the execution of the release, or shewing it void for fraud or illegal considerations? The rule against re-agitating matter adjudicated is subject generally to this restriction, that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may as to its immediate and direct object be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation so as to defeat its direct object."

In the celebrated judgment in *Outram v. Morewood*, 3 East. 346, Lord *Ellenborough*, reviewing the authorities, notices an old case from the year book, 7 Hen. 6, fo. 20, when one of the judges says—"There was a like case when a release was pleaded in bar, and the plaintiff said it was made by a duress of imprisonment, and was afterwards nonsuited and brought a new writ, and the release was again pleaded in bar, and he would have avoided the deed because it was made at a time when he was within age, and he was not received so to do, for that when he said the deed was made by duress, &c., he acknowledged it to be good in all points but that."

No comment is made on this reference, and the year book

and Brook's abridgement give no fuller notice of it. Its force is much diminished by the difficulty of understanding how the pleadings in a case terminating in a nonsuit could bind the parties.

On the whole, I feel bound by the various dicta in the books, and the tests suggested, not to differ from the rest of the court, however impossible I may find it to reconcile such a conclusion with what I believed to be the clear rule for the prevention of prolonged litigation.

See *Hutt v. Morrell*, 3 Exch. 241; *Beileau v. Rutlin*, 2 Exch. 665; *Buckmaster v. Meiklejohn*, 8 Exch. 637.

*Per cur.*—Rule absolute without costs.

THE TRUSTEES OF SCHOOL SECTION NO. 6, TOWNSHIP OF  
YORK V. WILLIAM HUNTER, THOMAS S. SMITH, AND  
THOMAS FOX.

*School Trustees—Collector—Guaranty—Securities.*

W. H. having been duly appointed collector by the trustees of school section, signed the following contract at the foot of the instrument appointing him:

"I agree, &c., to collect, &c., according to the said act, and bind myself, by my securities, in the sum of £250," and immediately under T. S. S. & T. F., his sureties, signed the following undertaking:—"We hereby agree to become security for the due fulfilment of the above contract."

W. H. paid over £141, 3s. 4d., a portion of the amount collected by him, the sum of £40, 5s. 9d. remaining uncollected. On an action brought by the trustees against the collector and his sureties, held that the sureties under their contract were not jointly liable with their principal for moneys uncollected by him. Also, that they were not jointly liable on their guaranty as sureties on default of the principal.

The declaration set forth, that in consideration that plaintiffs at the request of defendants, would appoint defendant Hunter to collect moneys rated on certain persons for school purposes, Hunter for himself, and defendants Smith and Fox as his sureties, undertook and agreed in writing that he should collect and pay the amount within thirty days from the 8th of October 1858 to the secretary and treasurer of the school section. That although plaintiffs did so appoint Hunter, yet he did not within thirty days, &c., or at any time before the commencement of this suit, collect the said sums of money. Second count, for not paying to the secre-

tary and treasurer within thirty days, &c., the sums collected.

Pleas, 1st. Did not undertake or agree, as in declaration alleged.

2nd. That Hunter did pay to the secretary and treasurer all moneys collected by him under the authority given him.

The case was tried at the Toronto spring assizes, 1860, before *Hagarty, J.*

The plaintiffs proved and put in an instrument as follows: "We, the undersigned Trustees of School Section No. 6, in the township of York, in the county of York, by virtue of the authority vested in us by the 8th clause of the 12th section of the act 13 & 14 Vict., ch. 48, hereby authorise and require you, William Hunter, of the township of York, after ten days from the date hereof, to collect from the several individuals in the annexed rate bill, for the period therein mentioned, the sum of money opposite their respective names, and to pay within thirty days after the date hereof the amount so collected, after retaining your own fees, to the secretary and treasurer, whose discharge shall be your acquittance for the sum so paid. And in default of payment on demand by any person so rated, you are hereby authorised and required to levy the amount by distress and sale of goods and chattels of the person or persons making default.

(Signed) *JESSE ASHBRIDGE,*  
*GEO. LESLIE,* [L.S.] Trustees.

Given under our hands and seal this 8th day of October 1858."

Immediately under this warrant was written the following:—"I, William Hunter, agree to the above conditions, and to collect the school rate, according to the act, and bind myself, by my securities, in the sum of £250 lawful money of Canada.

(Signed) *WM. HUNTER.*"

"We hereby agree to become security for the due fulfilment of the above contract.

(Signed) *THOMAS S. SMITH.*  
*THOMAS FOX.*"

The trustees had, before appointing Hunter, required him

to give security, and he said he could get the other two defendants. The trustees accepted them, and they signed as above. The roll and rate bill were given to Hunter with the warrant. The rate bill was in his possession, but was not produced by him when called for upon notice. The total amount he was authorised to collect was £219, 17s. 9d. He paid to the secretary and treasurer £141, 3s. 4d. The amount uncollected was £40, 5s. 9d. He was allowed 7 per cent. for collecting, amounting to £9, 17s. 10d., and the plaintiffs claimed a balance of £27, 18s. 6d. In February 1859, after demanding money from Hunter frequently, the trustees looked over his books, and found he had collected over £40 he had not paid over, but he made some payments afterwards. At one time he paid £7, 5s., and offered an order for £10, which the trustees agreed to accept, and they gave him a receipt for £17, 5s., which he took, but withheld the order from them. The amounts of Hunter's collections, of rates uncollected, and of his payments to the secretary and treasurer, were made out from his own accounts and statements as he produced them to the trustees or some of them. He claimed a larger percentage and some small items which the trustees disputed. Since the balance of £27, 18s. 6d. was struck he paid 18s. 3d. Evidence was given of Hunter's admission that he had used the money collected and not paid over for his own purposes, and of his promises to pay it. Evidence was also given to shew that he might have collected some parts at least of the unpaid rates. For the defence it was objected that there was a variance, the declaration stating that Hunter was to pay within thirty days, and the warrant only giving him twenty. That the three are sued jointly, whereas the sureties are not liable on any joint undertaking with Hunter. Leave was reserved to move to enter a nonsuit. The jury gave a verdict for plaintiffs for the balance of £27, and for uncollected rates, in all £67, 7s. 4d.

In Easter Term *Bell* (of Toronto) obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved, or for a new trial, the verdict being contrary to evidence, as it includes a sum not received by defendants or either of them, and

contrary to law, because it includes a sum for which two of the defendants were not liable by their contract.

*Harrison*, R. A., and *Hodgins* shewed cause. They cited *Raikes v. Todd*, 8 A. & E. 846; *Caballero v. Slater*, 14 C. B. 800; *Loftus v. Lee*, 18 U. C. Q. B. 195; *Lee v. Nixon*, 3 N. & M. 441, 1 A. & E. 201, S. C. See *Coldham v. Showler*, 3 C. B. 312.

*Bell*, contra, relied on *Lee v. Nixon*, and *Collins v. Prosser*, 1 B. & C. 682.

DRAPER, C. J.—It might perhaps be held, taking the warrant, the defendant Hunter's agreement, and the agreement or guarantee of the other two defendants together, that the consideration for the defendant's undertaking sufficiently appears on the whole of the papers to satisfy the statute of frauds. However, I give no decided opinion on that point, though my impression is with the plaintiffs.

But I cannot view the undertaking of the defendants Smith & Fox as a joint undertaking with that of the defendant Hunter. The appointment of Hunter appears by the warrant; his acceptance of it, and agreement to discharge the duties according to law, is his own act, and is plainly expressed. What follows is not so clear when he says, "I bind myself, by my securities, in the sum of £250." It may be amplified into a binding himself to the discharge of the duties undertaken in a penalty of £250, and perhaps *with* sureties, *i.e.*, that he, with the sureties, bound himself in that amount. At least, if the sureties had signed, together with him, such a construction would have been a fair one.

But the sureties express what they undertake. They say, "We hereby agree to become security for the due fulfilment of the above contract." They interpret what had preceded as a contract on Hunter's part, and if secured by a penalty of £250, still *his* contract secured by a penalty for which he only was bound. They do not limit their own responsibility unless in this way, that so far as £250 is the limited penalty to which Hunter has agreed, they agree to be securities that he shall pay to that extent. But this is an entirely separate contract from Hunter's. He agrees to discharge certain

duties, of which paying over moneys he may collect is one. They agree to do nothing except to answer in the event of his default. These agreements are distinct, and a joint action will not lie against Hunter, Smith, and Fox upon Hunter's agreement, nor on Smith and Fox's guaranty in case he makes default. I think, therefore, the rule to enter a nonsuit should be made absolute.

*Per cur.*—Rule absolute to enter non-suit.

Consolidated Stat. ch. 64, sec. 27, No. 2; Raikes v. Todd, 8 A. & E. 846; Caballero v. Slater, 14 C. B. 300; Lee v. Nixon, 3 N. & M. 441, 1 A. & E. 201; see also Wharton v. Walton, 7 Q. B. 474; Hawes v. Armstrong, 1 Bing. N. C. 761; Coldham v. Showler, 3 C. B. 312; James v. Williams, 5 B. & Ad. 1109; Collins v. Prosser, 1 B. & C. 682.

### LYDIA MINAKER V. SAMUEL ASH.

#### *Dower—Estoppel.*

*Held* that the recitals in a deed poll are not binding on the grantee, they being entirely the language of the grantor, consequently that the grantee is not estopped from setting up the contrary "in an action not founded on the instrument, and wholly collateral to it."

DOWER demanded as widow of Lewis or Ludowick Minaker, in lot number thirteen, fifth concession, township of Hamilton.

Plea—*ne unques seisie que dower.*

The case was tried at Cobourg in March last, before Sir J. B. Robinson, C. J.

A grant from the Crown for the lot, dated the 17th of May 1802, to one Michael Kesler was produced. Frederick Minaker swore that Michael Kesler was a discharged soldier, who died 33 or 34 years ago, very old. He had lived with Ludowick Minaker, the witness' uncle, for twenty years and more, in Marysburg. Ludowick Minaker died about two years ago. Kesler was unmarried as this witness thought. The witness saw his (Kesler's) will; it was written by Dingnan or Squire, and the witness attested it, and Dingnan and one other. He did not know where the will was, or who were the executors. At the request of plaintiff's attorney

the witness had searched among Ludowick Minaker's papers, which were produced to him by his (Ludowick's) son, but could not find this will. The son swore that at his father's death he got all his papers, and produced them all to the preceding witness to examine. Another witness, also a nephew of Ludowick Minaker, stated that when he was a boy of thirteen or fourteen he saw what was said to be Kesler's will—saw them preparing it, as they said. Proof of ineffectual searches in the proper County Register Offices was given, and also of a search in the office of the register of the Surrogate Court, for this will. It was also sworn that Kesler had no chattel property. The learned Chief Justice did not think this sufficient to let in secondary evidence of the contents of the will, and the demandant's counsel then called Leonard Perrin, who proved that he got a deed poll from Ludowick Minaker for this lot, dated the 14th of February 1833, by which, in consideration of £32, 10s., Ludowick Minaker sold and made over to him (Perrin), his heirs and assigns, "all his right, title, interest, claim, and demand whatsoever, either in law or equity," to a certain parcel of land containing 200 acres, which was devised by will to the said Ludowick by Michael Kesler, the original grantee of the Crown, being lot No. 13, fifth concession of Hamilton; to hold the above granted and bargained premises to Perrin, his heirs and assigns, forever, without any let, hinderance, or molestation whatsoever from him Ludowick Minaker, his heirs, executors, administrators, and assigns, or any other person or persons by or with his or their consent. Perrin also proved a bond given by him, dated the 30th of March 1833, to Lewis Minaker, son of Ludowick, to indemnify him against any claim to this lot, to be made on account of a bond made in 1799 by Kesler to one Isaac Secor, in a penalty of £200, subject to a condition to be void on Kesler conveying this lot No. 13 in fee to Secor, as soon as deeds should be granted by government. All right and interest in and to this bond were transferred to Leonard Perrin.

Forty acres of this lot were, it appeared, sold for taxes, and conveyed by the sheriff of the district of Newcastle to

Dougald Campbell, in fee, by deed dated the 22nd of August 1832, and by indenture, dated the 3rd of May 1833, Dougald Campbell conveyed these same 40 acres to Leonard Perrin in fee.

By indenture dated the 3rd of May 1833, Leonard Perrin, in consideration of £150, sold and conveyed this lot, No. 13, 5th concession of Hamilton, to Zaccheus Burnham, *habendum* in fee, and by indenture dated the 20th of July 1847 Burnham conveyed 100 acres of the same lot in fee to defendant, but defendant being called as a witness stated that he bargained with Burnham for the whole lot in 1836, and went into possession of it on the 10th of December 1836, and he and those claiming under him have been in possession ever since, shewing that this chain of title has been coupled with such possession. The learned Chief Justice directed a verdict for defendant, reserving leave for the demandant to move to enter a verdict for her, or a nonsuit.

In Easter Term *Patterson* obtained a rule *nisi* to enter a verdict for the demandant pursuant to the leave reserved, on the ground that sufficient evidence was given of the seisin of Ludowick Minaker, and that the tenant was estopped by the statement in the deed from Ludowick Minaker to Leonard Perrin from denying the devise of the lands by Michael Kesler to Ludowick Minaker, or why a nonsuit should not be entered on the ground that sufficient evidence was given to entitle the demandant to give secondary evidence of the contents of Michael Kesler's will, and that such secondary evidence was improperly rejected.

*Cameron*, Q. C., in Trinity Term, shewed cause. For the demandant were cited *Drake v. North*, 14 Q. B., U. C. 476; *Doe v. Burton*, 16 Q. B. 808; *Davenport v. Davenport*, 7 C. P., U. C. 401; *Young v. Raincock*, 7 C. B. 319; *Carpenter v. Buller*, 8 M. & W. 212; *Lockman v. Nesse*, 5 Old Series, 505.

*S. Richards*, Q. C., and *Patterson* supported the rule, referring to *Young v. Raincock*, 7 Com. B. 310; *Carpenter v. Buller*, 8 M. & W. 812.

DRAPER, C. J.—The demandant had to prove that Ludowick Minaker, her deceased husband, was during the coverture seised of the lot in question, and with this view an attempt was made to prove that Kesler, the grantee of the Crown, devised it to him. There was some evidence that Kesler executed a will with three subscribing witnesses, but the witness does not state *when* he saw it executed, how long before Kesler's death, nor does he or anyone else prove its existence as the last will of Kesler. Proof that Kesler made a will shews a plain intention at the time on his part not to die intestate, but it does not necessarily establish that he did not die so. If we knew that the will was made shortly before his death, there would be a strong presumption that he left it after him, that the same state of facts continued, but it is a presumption that may be rebutted. The demandant's counsel insisted both at the trial and at the argument that search had been made in every place where, if the will were in existence, it ought to be found. This, in the absence of any proof that the will was seen after Kesler's death by any person, coupled with the undeniable evidence of his having entered into a contract to convey this land as long ago as 1799, seems to me, if not sufficient to raise a contrary presumption, at least materially to weaken the presumption set up for demandant, if it does not afford reason for suspecting, that the will may have been made to fulfil the contract made by Kesler, and not to dispose of land in violation of it; but under the circumstances I do not think sufficient foundation was laid by this part of the evidence to let in secondary evidence of the contents of the will.

The case then must rest on the effect of the deed made by Ludowick Minaker to Leonard Perrin. It is contended for the demandant that Perrin by taking this deed estopped himself from denying Ludowick Minaker's seisin as owner in fee, and that defendant as claiming under him is equally estopped. Or, that at least the statement in this deed operates as an admission of the existence of the will of Kesler, sufficient after the search proved to let in secondary evidence of its contents.

As to the estoppel, in *Carpenter v. Buller*, 8 M. & W. 213, *Parke*, B., in delivering the judgment of the court, and after laying down the general proposition that if a distinct statement of a particular fact is made in the recitals of a bond or other instrument under seal, and a contract is made with reference to that recital as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital, says,—“There is no authority to show that a party to the instrument would be estopped, *in an action by the other party not founded on the deed and wholly collateral to it*, to dispute the facts so admitted, though the recitals would certainly be evidence.” And in regard to the case of *Lainson v. Tremere*, 1 A. & E. 792, and to another case in 1 Roll Abr. 873, he points out that though the defendant in the former case was estopped from denying an amount of rent recited in the bond, and in the latter that he was married, the actions being brought on the instrument containing the recital, the learned Baron observes, that in another suit, *though between the same parties*, where a question should arise as to the amount of the rent in the one case, or as to the marriage of the obligor in the other, it could not be held that the recitals in the respective bonds were conclusive evidence of the fact. So also in *Young v. Raincock*, 7 C. B. 337-8, *Coltman*, J., in delivering the judgment of the court, lays it down as the result of the authorities that “where it can be collected from the deed that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, the statement of those facts, though but in the way of recital, shall estop the parties to aver the contrary.”

In the present case Perrin having an equitable estate in the land, and desirous of buying in any adverse claim, took a deed poll from Ludowick Minaker, by which the latter “sold and made over all his right, title, interest, claim, and demand whatsoever, either in law or in equity, to a certain parcel of land, containing two hundred acres, which was devised by will to “him” by Michael Kesler, the original grantee of the Crown, being the lot in question. As a deed poll this would not conclude Perrin (Co. Lit. 363 b.) in an

action between him and Minaker, and the contract of Minaker is not made in reference to the mode in which he acquired title to the land, for if it were it might be said that he conveyed no more than the right and estate which he took by the alleged devise, whereas it is clear that he conveyed all the right and estate he had, however, acquired, and the form of the deed is such that I think it equally clear that if he had no estate whatever no action would lie against him by Perrin or his assignees; besides which the action is not upon that deed, nor is the demandant party or privy to it. There certainly is no estoppel.

Nor is this statement, in my opinion, evidence of any admission on Perrin's part. It is the representation of Ludowick Minaker and no more; Perrin desired to extinguish an adverse claim, and Minaker represented this claim was founded on a devise made by Kesler. It was indifferent to Perrin on what ground Minaker's claim was set up. He knew the nature of his own interest, and was desirous to buy anything which he apprehended might interfere with it; he might, and probably did, believe in the truth of Minaker's statement, and he paid his money and took his chance whether the statement was true or not. The deed does not even show an implied admission on Perrin's part that Minaker was seised in fee, for no part of the language of the deed is his. If Perrin had dealt with Minaker as the owner in fee, he would have no doubt required the covenants which a vendor whose title is only by devise from a former owner can be properly called upon to give. But he bought merely whatever right and estate Minaker might have, and took no covenant that he had any. Under such circumstances it would, in my opinion, be unjust to infer an acknowledgment on Perrin's part, amounting to an admission of Minaker's right, whether as devisee of Kesler or otherwise, and especially in a suit by a stranger to the deed. I see no ground for ordering the verdict to be entered for the demandant.

If I had considered the grounds stated in the rule in support of the motion for nonsuit were sustained, it might have been proper to grant a new trial. Being of a contrary opinion, I think so far as these reasons are concerned the

rule should be discharged generally. But from the leave reserved the learned Chief Justice seems to have thought it would not perhaps be proper to bar the demandant's right to claim dower altogether, and in deference to that suggestion I am willing to make absolute the rule for setting aside the verdict for the defendant, and entering a nonsuit instead. The demandant must make her election within six weeks, and if she elects to take a nonsuit must pay the costs within that time, otherwise the rule to be discharged.

The opinion I have formed renders it unnecessary to advert to any distinction which may exist as to the forty acres sold for taxes.

Rule discharged unless demandant takes a nonsuit and pays the costs.

*Per cur.*—Rule accordingly.

## WEAVER V. BULL ET AL.

### *School act—Arbitration—Costs of pleading.*

UPON TROVER brought for a seizure of goods upon the authority of a warrant issued by arbitrators under the school acts,

*Held* that a plea which stated that the trustees neglected or refused (without the word *wilfully*) to exercise their corporate powers for the payment of money awarded to the school teacher was bad on demurrer.

*Held* also that the statute (Con. Stat. U. C., ch. 64) does not authorise the arbitrators to determine whether the trustees have wilfully neglected or refused to exercise their corporate powers, or to enforce against them a personal responsibility; and lastly, that the school act (Con. Stats., ch. 64) does not provide for the payment of arbitrators or of the costs of a reference thereunder.

TROVER for a span of horses, waggon, and harness.

*Plea* by defendants Bull, Downing, and Conkey, that during the year 1857, and from thence until and at and after the committing, &c., plaintiff was one of the school trustees for Union Section No. 2 of the township of Rawdon, and the trustees of that section for 1857, by an agreement in writing under the corporate seal, employed defendant Mary Foote, then Mary Stevens, to teach in the said school at a certain salary, and that she did fulfil the said agreement on her part. That a dispute having arisen between her and the said trustees with respect to the payment of her salary, she,

for the purpose of settling the same and to obtain payment, determined to have the matter referred to arbitration, and about the 9th of May 1859 required the trustees of the section, plaintiff being still one of them, to appoint an arbitrator; and she immediately thereupon appointed the defendant Geo. E. Bull as an arbitrator, and the trustees appointed defendant Conkey an arbitrator, and the Local Superintendent appointed one Brown as an arbitrator in his stead, to arbitrate on the matters in dispute. That the said arbitrators, on the 5th of July 1859, published their award, under their hands and seals, and awarded that there was due and owing to the said Mary Foote £25, 4s. 9d. from the trustees of the said school section, and that the trustees should pay that sum to her, and the further sum of £14 for costs, charges, and expenses attending the award; and that the trustees should pay the same, amounting to £39, 4s. 9d., out of the funds of the Union School section, thirty days from the date of the award; and if they refused or neglected, that they should be personally liable for the same, and that then the plaintiff and the other two trustees should pay the said sum, of all which the plaintiff had notice. That the trustees did neglect and refuse to pay the said sum of £39, 4s. 9d., and to use their corporate power to collect the sum necessary to fulfil their corporate obligation in the matter, and thereupon the arbitrators, for the purpose of enforcing their award and obtaining payment for the said Mary Foote, did, at her request and according to the statute, and after the expiration of the thirty days, issue their warrant under their hands and seals, directed to the defendant Downing as their bailiff, and thereby commanded him to levy, by distress and sale of the goods of the said Union School section No. 2, the said sum of, &c., and costs of execution, and to pay the same to the arbitrators for the said Mary Foote, of which the plaintiff had notice. That Downing returned the said warrant on the 8th of August 1859, *nulla bona*, of which plaintiff had notice. That thereupon, on the 29th of September 1859, the arbitrators by their summons, under their hands and seals, summoned plaintiff and the other trustees to appear before them and shew cause why a warrant should not issue against their

personal property for the amount of the award and costs. And the defendants say that the plaintiff and the other trustees did neglect and refuse to exercise their corporate powers to collect the sum necessary to fulfil their corporate obligation in the matter. That plaintiff appeared to the summons, and gave no sufficient answer, and thereupon the arbitrators, on the 3d of October 1859, awarded that the plaintiff had no sufficient cause to shew, and did order and adjudge that the plaintiff and the other trustees were personally liable for the amount of the award and costs, and all subsequent charges and expenses, and that the plaintiff and the other trustees did neglect and refuse to exercise their corporate power as trustees to collect the sums necessary to discharge their corporate obligations in the matter, and that the plaintiff and the other trustees should forthwith pay to the said Mary Foote the said sum of £39, 4s. 9d., with the further sum of £4, 6s., being a balance due on subsequent costs, &c., in the matter, of all which plaintiff had notice. That afterwards, on the 3rd of October 1859, the arbitrators, according to the statute issued another warrant, under their hands and seals, to defendant Downing, commanding him, of the goods and chattels of the plaintiff and the other trustees, to levy the moneys on the said warrant mentioned, which warrant stated on the face of it all the previous proceedings, and required him to levy £43, 10s. 9d., and the costs of so doing, of all which plaintiff had notice, and Downing as such bailiff took in execution the goods of the plaintiff in the declaration mentioned, and sold the same, and levied thereout the moneys in the warrant mentioned, which is the conversion in the declaration mentioned. General demurrer and joinder.

The demurrer was argued by *O'Hare* for the plaintiff, and *Bell* (of Belleville) for the defendants; Con. Stat., ch. 64, sec. 84; *Ranney v. Maclem*, 9 C. P. U. C. 192, were cited.

DRAPER, C. J.—I am of opinion this plea is bad. In the first place, it does not state as a fact that the trustees *wilfully* neglected or refused to exercise their corporate powers for the payment of the money awarded to the school teacher.

If there were no other objection to the plea, we might allow this to be amended on payment of costs.

Secondly, although it is averred that upon a return of *nulla bona* to the warrant issued to levy of the goods of the trustee corporation, the trustees were summoned before the arbitrators, and the plaintiff appeared to such summons, and the arbitrators, on hearing no sufficient answer from him, adjudged that the trustees "did neglect and refuse to exercise their corporate powers as such trustees;" the word "wilfully" is again omitted, and this defect in the adjudication, which is the foundation of the last warrant, cannot be amended by us.

Thirdly, as to the powers of the arbitrators. They exist only by the statute; the 84th, 85th and 86th sec. of the Common School Act define them. The 84th sec. gives the three arbitrators, or a majority of them, power to decide finally the matter in dispute, which appears in this case to have been either the right of the teacher to a salary or the amount due, or perhaps both; the 85th relates exclusively to matters preceding the award; and the 86th authorises the arbitrators, or any two of them, to issue a warrant to levy the sum awarded, and authorises the person to whom it is directed to do so, "with all reasonable costs," meaning evidently the costs of levying. But no part of the act confers authority on the arbitrators to determine the question whether the trustees have wilfully neglected or refused to exercise their corporate powers, or to enforce against them a personal responsibility. In *Ranney v. Macklem*, in expressing my opinion that before a warrant could issue there must be an adjudication by some authority of the fact of wilful neglect or refusal, I intimated that possibly arbitrators to be named under the statute might have power to make this adjudication. The obvious design shewn in many portions of the School Acts to withdraw disputes and questions arising in the administration of them from cognizance by the ordinary tribunals, and the provision for an arbitration between teachers and trustees, extending not only to differences respecting salary, or the sum due, but also to *any other matters in dispute* between them, led me to doubt

whether this question of wilful neglect might not be treated as a new matter in difference between the teacher and the trustees, and therefore a subject of arbitration, and this idea was supported by the consideration that under sec. 83 the teacher is entitled to claim the continuance of his salary at the rate agreed on, even after the period of his engagement has elapsed, until the trustees pay him the whole of his salary under the agreement. But the act of last session has removed my doubt, for the 9th section (23 Vic., ch. 49) gives express power to the arbitrators who make any award under the 84th sec. of the School Act, to enforce their award against the trustees individually by their warrant, in case the trustees wilfully refuse or neglect, for one month after publication of the award, to comply with it. This is not, as worded, a declaratory, but a new enactment conferring an additional power, and consequently assumes that the arbitrators, until this enactment, did not possess it. So far I think the language of the section clear, though there is a want of accuracy and precision in first making the personal liability of the trustees to depend on wilful refusal or neglect *for* one month after the publication of the award, and next authorising the arbitrators to issue their warrant to levy on the personal property of the trustees *within* one month after such publication, when the obvious intention is that no such warrant should issue until after the expiration of the month allowed. And it is still left unsettled how and by whom the fact of wilful neglect or refusal is to be determined, unless it is meant that the mere fact that the award has not been obeyed is to be conclusive evidence of wilful neglect or refusal, in which case there is some unnecessary circumlocution, leaving an opening for conflicting opinions. But however this may be, I think the arbitrators had not under the former act authority to try the question and to issue the warrant relied upon in the plea.

Fourthly, the award pleaded, besides awarding payment of £25, 4s. 9d. to the teacher as due for salary, awards also the payment of £14 costs. The School Act, Consol. Stats., ch. 64, neither provides for the payment of the arbitrators nor of the costs of the reference. This omission is supplied

by sec. 15 of the new act, though it leaves in the discretion of the arbitrators what costs they shall allow as between the parties, and though it gives a rule fixing the amount of their own remuneration. This enactment recognises the absence of any previously existing authority to award the costs of the reference. There is therefore an excess of jurisdiction vitiating *pro tanto* the award, and to that extent the justification fails. And as the costs are more than one-half the debt, the objection is substantial. It would have been better, as ensuring uniformity at least, if some scale had been furnished for the guidance of the arbitrators as to the costs they should allow. The trustees upon whom the duties of office are forced may complain that if the teacher had been left to sue in the division or county court, according to the amount, the costs in the one case would not have been one-quarter, and in the latter probably one-half, of the amount awarded by the arbitrators.

I think the plaintiff entitled to judgment on this demurrer.

*Per cur.*—Judgment for plaintiff.

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### HENDERSON V. HARRIS.

#### *Ejectment—Patent—Description in.*

Upon ejectment brought to recover possession of certain land, called part of 22 in the 5th concession of Hamilton, and described as extending to the edge of Rice Lake, it was proved that there was a concession in the original survey of the township (called the 9th) between the 8th (to the north thereof) and Rice Lake. The plaintiff proved that the patent under which he traced title described the 8th concession as extending to the banks of Rice Lake, but the deed to himself only stated the lot without giving metes and bounds.

*Held* that although the specific description in the patent and not the general description of the lot would probably govern, yet the plaintiff having in his notice of title only claimed lot 22 in the 8th concession, whereas the part contended for was in the 9th concession, the defendant was entitled to a verdict.

EJECTMENT for that part of No. 22, 8th concession of Hamilton, described as follows, commencing on the western boundary line of the said lot, at a distance of 50 chains south from the shore of Rice Lake, thence northerly along the said boundary line to the shore aforesaid, thence easterly along the shore of Rice Lake to the eastern boundary line

of said lot, thence southerly along the said eastern boundary for fifty chains, thence westerly across the said lot to the place of beginning.

Defence for a part of the land in the writ mentioned described as follows, commencing at the south-east angle of lot No. 22, in the ninth concession of the said township of Hamilton, thence north  $16^{\circ}$ , west 13 chains and 25 links, more or less, to the shore of Rice Lake, thence westerly along the said shore 20 chains, more or less, to the western limit of the said lot, thence south  $16^{\circ}$ , east 15 chains  $88\frac{1}{2}$  links, more or less, to the front of said concession to the place of beginning, which said part the plaintiff claims as being a portion of lot No. 22, 8th concession of Hamilton.

The plaintiff's notice of claim was by deed from Solomon Chatterton, who derived title under the grantee of the Crown.

The defendant, besides denying the title of the plaintiff, asserted title in himself by length of possession, and claimed title thereto as being a part of No. 22, 9th concession of Hamilton, being a portion of the same premises claimed by plaintiff as part of No. 22, 8th concession of said township.

The trial took place at Cobourg in April last before Sir *J. B. Robinson*, C. J., when a verdict was rendered for the defendant, leave being reserved to move to enter a verdict for the plaintiff.

In Easter Term last *Cameron*, Q. C., obtained a rule *nisi* accordingly on the ground that the verdict was against law and evidence and the judge's charge, or for a new trial on the ground that the plaintiff was entitled to recover, as his title was clear to the land described in the writ, and the defendant rested on a title to a different lot.

In Trinity Term *Hector Cameron* shewed cause, and *J. H. Cameron*, Q. C., supported his rule.

DRAPER, C. J.—None of the exhibits used at the trial were in court during the argument, except the tracing of a part of a map of the township of Hamilton, which map is in the Crown Lands Office, nor have I seen any of them. But I gather from the notes of the learned Chief Justice

that the patent from the Crown to John Sharpe, dated 12th June 1806, for lot No. 22 in the 8th concession of Hamilton, described that lot as extending to the Rice Lake. How the land was described in the deed of the 13th of Feb. 1834, executed by Mr Allan, as attorney for the heirs of John Sharpe, to William Gamble, does not appear, nor yet in the deed from William Gamble to William Allan, under whom both plaintiff and defendant claim; for by deed dated the 2d of June 1849 Mr Allan conveyed lot No. 22, 8th concession Hamilton, to Solomon Chatterson, without in any way describing the lands by metes and bounds; and by deed, dated the 7th of November 1850, Solomon Chatterson conveyed the same lot without giving any abuttals to the plaintiff. By deed dated the 26th of May 1852 Mr Allan conveyed lots No. 21 and 22, 9th concession of Hamilton, to the defendant.

The contest was whether, as the description in the patent of No. 22 in the 8th concession carried the boundaries of that lot to the Rice Lake, the plaintiff has a right to recover according to those boundaries, although, as was sufficiently proved at the trial, and was expressly admitted by the plaintiff's counsel on the argument, there is and was, when Mr Allan conveyed to the defendant, a ninth concession, lying between the 8th concession and the Rice Lake—a fact which was also shewn to have been recognised and known in the Surveyor General's Office at and from the time the original map of the survey was returned there, and was confirmed by other surveys of a more recent date, in one of which stone monuments marking the boundary between the 8th and 9th concessions were planted under the authority of the Court of Quarter Sessions pursuant to the statute.

According to the case of *Doe dem. Murray v. Smith*, 5 Q. B. U. C. 225, the specific description contained in the grant, and not the general description by the name of the lot, would probably govern, so that all the land embraced in the description passed to the grantee by the name of No. 22, 8th concession, though part of it constituted No. 22 in the 9th. The difference between the two cases, so far as the grants from the Crown go, is that in *Doe v. Smith* both lots appear

to have been in the same concession ; here the land lies in two concessions, between which, according to the map, there is a reservation for a public highway. Still the language of the learned Chief-Justice in that case at the close of his judgment seems to extend to a case like the present. He says—" It may indeed be urged that what was intended in the case before us to be granted was lot No. 4, and *that* only, and that the only mistake was in imagining that it extended to the river, and that the quantity of land expressed shews *that* ; but, on the other hand, it cannot for a moment be maintained that the King did not intend the grantee to hold the land up to the river, when the river itself is expressly made to constitute its boundary along one whole side of it, and the very course of the river is mentioned." According to that case, therefore, all the land composing No. 22 in the 9th concession as well as in the 8th passed to the grantee, for the boundaries set out in the letters patent included it.

But in the deed of the 2nd of June 1849 from Mr Allan to Chatterson, the only land conveyed is lot No. 22, 8th concession, without any description. I am at a loss, while conceding the effect of the grant, to understand how this deed can be considered to give title to any land in the 9th concession. The moment it appears there was in fact a 9th concession, with a lot No. 22 in it lying north of No. 22 in the 8th concession, and that the plaintiff is seeking to recover this lot, or any part of it, in the 9th concession, the case is I conceive at an end, unless it be held that by granting the land by the name of No. 22 in the 8th concession the Crown have altered the plan of survey, and have in fact not merely granted the land to the Rice Lake, but have also made all the land so granted to be for all future time and as to all parties lot No. 22 in the 8th concession. If such indeed be the legitimate consequence of the decision in *Doe v. Smith*, I should doubt its authority. But I do not so understand it.

Even if the deed to the plaintiff had contained a description similar to that in the patent, I should have thought it open to argument, and considering the statutory rules as to lots and concessions, and the boundaries thereof, whether,

when it was made plain that there was a 9th concession within which the land in dispute lay, and conceding (though only for the argument's sake) that the same land would then have passed by the deed to the plaintiff that passed by the grant from the Crown, the plaintiff ought not in his ejectment summons to have claimed it according to the truth, namely, as lot No. 22 in the 9th concession, and have given in evidence his deeds, commencing with the grant from the Crown, to prove that by force thereof he had title to No. 22 in the 9th concession. For I do not understand Doe v. Smith to decide that by granting under the name of lot No. 4 land which according to the actual survey on the ground was marked and designated as lot No. 3, the original and true name of the lot was altered. The effect of that case I take to be that lot No. 3, or some part of it, was granted *by force of the description*, although the true boundaries of No. 4 would not include it. The language of the judgment in that case appears to me so to determine this question.

It is not therefore strictly speaking a question of boundary, for the boundaries of No. 22 in the 8th concession are not disputed by the defendant any more than the plaintiff's right to that lot, and while I am satisfied the plaintiff shewed no right to recover land in the 9th concession, for which he was contending at the trial, it appears to me equally clear that on this ejectment summons he never could have a verdict for any land not forming part of No. 22 in the 8th concession.

I do not understand that it was contended at the trial, though the question is raised by the latter alternative of the rule, that the plaintiff bringing an ejectment for No. 22 in the 8th concession, and having proved an uncontested title to that lot, should have had a verdict, taking possession at his peril. From all that now appears, the plaintiff's succeeding on that ground would have only gained the costs of the cause, and as he did not so put his case at the trial, we should not now allow him to succeed upon it, or give him a new trial, the most favourable effect of which would be to give him the costs of the cause.

I think the rule should be discharged.

*Per cur.*—Rule discharged.

FARQUHAR ET AL. V. THE CORPORATION OF THE CITY OF  
TORONTO.

*By-law—Restriction of sale of wood by—Fine under.*

*Held* that the Municipal Institutions Act (Con. Stats. of U. C., ch. 54) does not authorise the imposition of a tax per cord upon wood brought into town and not placed in the public wood market for sale.

In Easter Term *Anderson* obtained a rule *nisi* to quash the fifty-fifth and fifty-sixth sections of by-law No. 313 of the City of Toronto, respecting the public markets and weigh-houses of the said city, with costs, on the ground that the said 55th section seeks to impose a toll upon all wood not taken to the wood-market, whereas the Corporation have no authority to impose such a charge, and on the ground that the 56th section places a limitation on the right of parties bringing wood into the city, which restriction the Corporation are not authorised by law to impose.

The relators made affidavit that they were residents of the city and interested in the by-law. Farquhar swore that he was a dealer in wood, a portion of which he sold in his private wood-yard in the city, and a portion from the cars of the Grand Trunk Railway, by which such wood was brought into the city; that under this by-law the officers of the city claimed from him toll for wood brought into the city by him for sale, some of which he offered for sale and sold at his woodyard, and some he sold from the cars; and the police magistrate of the city has held that he was bound to pay toll for the wood so sold by him, as well as for the wood sold from the cars, though the same is not exposed for sale in the market, or in any other place than the wood-yard and on the cars. Wray swore he was a dealer in wood, a portion of which he sold on a wharf in the city, which belonged to a third party, and some he sold in his own private wood-yard. That under the by-law the officers of the city claimed from him toll for wood brought into the city by him, by his own schooner, for sale, and to sell on the said wharf, and some he sells in the market, and the police magistrate has held that he is bound to pay toll on the wood which he does not sell in the market, but is exposed for sale and sold on the wharf.

The 55th section is as follows: "Every load of wood here-

after brought to the wood-market, and continued therein, in any vehicle, shall be deemed and taken *prima facie* to be cordwood for sale, and the said wood so brought and remaining as aforesaid, and the party bringing the same, or in charge thereof, shall be subject to the same charges as if the same wood were or had been offered for sale in the said market upon each occasion of its so remaining thereat. The fees shall be five cents for every load of firewood brought by a two-horse conveyance, and three cents for every load brought by a one-horse conveyance, and all wood brought into the city for sale shall be subject to a fee or charge of five cents per cord, as if the same were brought into the market for sale."

The 56th section is: "All waggons, carts, or other carriages bringing wood into the city for sale shall be placed along Front Street, west of the St. Lawrence Market, and at the other public markets in such place as may be pointed out by the Standing Committee on Public Markets, or its officers, and any person who neglects or refuses to comply with this law, or who leaves the line before he has disposed of his load, unless to leave the market, or shall loiter about the streets with his load, shall be liable to the penalty herein mentioned."

*Cameron*, Q. C., shewed cause, referring to the 10th and 15th sub-sections of section 294 of the Municipal Institutions Act (Cons. Stat. U. C. ch. 54), and argued that these gave authority to pass the by-law in question. He suggested that the objections were rather to the decisions of the police magistrate than to the by-law itself.

*Anderson* supported his rule.

DRAPER, C. J.—The 294th section gives power to the council of every city to pass by-laws for the following purposes—sub-section 10, "for regulating the *place* and *manner* of selling and weighing butcher's meat, fish, hay, straw, and fodder, wood and lumber;" and sub-section 15, "for regulating all vehicles, vessels, and other things in which anything is exposed for sale or marketed in any street or public

place, and for imposing a reasonable duty thereon, and establishing the mode in which it shall be paid."

I see no objection to the power of the council of the city to pass the fifty-sixth section. It appears to me to be authorised by the 15th sub-section of the 294th section of the Municipal Institution Act. There is nothing in the language of this portion of the by-law which necessarily applies to or restricts any waggons, carts, or carriages bringing wood into the city which is meant for sale, other than those *in which* such wood is exposed for sale or marketed in any street or public place. In this section it is to be remarked no duty is imposed on such vehicle or vessels, though the 15th sub-section expressly sanctions such a proceeding.

The former part of the fifty-fifth section of the by-law appears to me not to be open to any objection taken, but the concluding words, "and all wood brought into the city for sale, and not taken to the wood-market, shall be subject to a fee or charge of five cents per cord as if the same were brought into the wood-market for sale," appear to me, on the best opinion I can form, to contain an imposition of a tax upon commodities not warranted by the statute.

Both the 10th & 15th sub-sections referred to are in the statute of 1858, and in the Consolidated Statutes inserted under the general head "*Markets.*" The power of regulating the *place* of selling wood authorises the establishment of a wood-market, or of a place or places outside a market, where wood may be sold; and the 15th sub-section authorises the imposing a duty on the vehicles, &c., on which wood may be exposed for sale. A former section confers authority to pass by-laws for inflicting limited fines and penalties for breach of any of these or any other by-laws; but the imposing a duty on all wood brought into the city for sale does not fall within either of these authorities, nor within any authority to impose and levy market tolls. It is in effect enacting that wood brought into town for the purpose of sale, though neither exposed for sale or marketed in any street or public place, or in any market, but placed at once on private premises, and left there at the pleasure and convenience of the

proprietor to be sold, may be taxed by the Corporation. It is one thing to restrain the selling of wood to particular places, and enforcing that restraint by penalty; it is another and very different thing to levy a tax on wood brought into private premises for sale, or to prohibit the sale of wood unless the vendor took out and paid for a license. A special authority is in my opinion necessary in the present case, and I do not find it in the provisions referred to, or in any other part of the statute.

I think, therefore, so much of the by-law must be quashed with costs.

By-law quashed as to part of 55th section.

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MULDOON V. BILTON ET AL.

*Married woman—Action against—Joinder of husband—Pleading.*

Upon an action brought against a married woman for a cause of action which occurred *dum sola*,

*Held*, 1. That the husband was properly made a party thereto.

2nd. That it is necessary to aver that at the time the action was commenced the female had separate estate.

The declaration stated that defendant Mary Ann Bilton was a widow, and before her marriage with the other defendant, on the 27th of May 1859, agreed with the plaintiff to employ him as a clerk and salesman, and to pay him a salary of \$40 per month from the date of the agreement until January 1st then next, and to board and lodge him, and that plaintiff should not draw on account of his wages more than should be absolutely necessary for his personal expenses, but should allow the same to remain in the hands of the said Mary Ann until the said 1st of January; that plaintiff should conduct the business according to the orders of the said Mary Ann, and should he refuse to do so the agreement should be void. That as soon as might be after the said 1st of January an account of the stock in trade should be taken, and the plaintiff admitted as a partner, on certain conditions set forth in the declaration. Averment that plaintiff entered the service of the said Mary Ann as such clerk and salesman, and did all things necessary on his part to entitle him to be taken into partnership; yet the said Mary Ann, before the said

1st of January, intermarried with the other defendant, and afterwards on the said 1st of January dismissed plaintiff from her employ and refused to take him into partnership.

*Pleas*—1st. That after the making of the agreement, and before the 1st of January 1860, defendants intermarried, and before the said 1st of January plaintiff accepted and received from defendants his wages, at the rate of \$40 per month from the time he entered the service of the said Mary Ann, and so the said agreement was put an end to.

2nd. That no time was fixed for the commencement or continuance of the partnership; and that no account was taken of the “partnership property” before the commencement of this suit.

3rd. That plaintiff received more of his wages than was necessary for his personal expenses, and did not allow his wages to remain in the hands of the said Mary Ann until the 1st of January 1860, but on the contrary demanded and received his wages, and so the said agreement was ended.

Demurrer to all the pleas. To the 1st, that the breach is, that defendants dismissed him and refused to take him into partnership, and that the taking his wages is no answer to that breach.

To the 2nd, that the taking the account was the defendants’ duty as much as the plaintiffs, and that the defendants by dismissing plaintiff deprived him of the opportunity of taking the account.

To the 3rd, that the leaving the plaintiff’s wages in the hands of the said Mary Ann was not a condition precedent to the taking plaintiff into partnership.

Exceptions to the declaration—1. That no time was specified for the continuance of the partnership, which was therefore at will, and might have been put an end to at once, it was therefore *damnum absque injuriâ*. That it is not shewn the time for commencing the partnership has arrived, as stock has not been taken. 3. Not alleged that defendant refused to carry on the co-partnership, but only that Mary Ann refused. 4. That no joint cause of action is shewn.

*Cameron, Q. C.*, supported the demurrer, citing 19 sec. 22

Vic., ch. 34; Story on Partnership, 306; Collyer on Partnership, sec. 60.

*M. C. Cameron, contra.*

DRAPER, C. J.—By 22 Vic., ch. 34, sec. 19, Cons. Stat. U. C. ch. 73, sec. 18, it is enacted—"In any action or proceeding at law or in equity by or against a married woman, upon any contract made or debt incurred by her before marriage, her husband shall be made a party if residing within the province; but if absent therefrom, the action or proceeding may go on for or against her alone, and in the declaration, bill, or statement of the cause of action it shall be alleged that such cause of action accrued before marriage, and also that such woman has separate estate, and the judgment or decree therein if against such married woman *shall be to recover of her separate estate only*, unless in any action or proceeding against her in which her husband has been joined as a party any false plea or answer has been pleaded or put in by him, when the judgment or decree shall be in addition to recover against him the costs occasioned by such false plea or answer, as in ordinary cases."

The husband is properly made a party with the wife to this action brought against her on a contract made by her before marriage.

The declaration complies with the statute by alleging that such cause of action accrued before marriage, but where is the averment that the female defendant *has* separate estate. I understand the averment required by the legislature to refer, if not to the time of declaring, which might possibly be too rigid a construction, at all events to the commencement of the suit. For the purposes of this case it is not necessary to determine whether the more rigid construction should prevail, for neither averment is made; there is quite enough to shew that the female defendant had goods and chattels before her marriage with the other defendant, and at the time the contract was made, and possibly when the two defendants intermarried, but that is not what the statute requires, for it goes on to provide that the judgment, if against the married woman, shall be to recover of her separate estate only, which

shews clearly, I think, that in order to the maintenance of the action the averment must be made that at the time it was brought she had separate estate. It seems the policy of the statute that the husband cannot be sued for the debt of the wife incurred *dum sola*, unless she *has* separate estate out of which it may be recovered, and that the creditors' recourse is limited to such estate.

Although this objection is not taken by the demurrer, and was not alluded to on the argument, we are bound to take notice of the requirements of a public act, and must therefore hold this declaration bad for omitting to comply with them.

Judgment for defendants.

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### FEEHAN V. LEE ET AL.

#### *Assignment for general benefit of creditors—Employment of Assignor under— Release Clause.*

*Held* that an assignment (duly filed), for the general benefit of creditors, containing a power for the employment of the assignor in the winding up of the business, giving those a share who should execute, without any limitation in time for executing, and containing a release clause, except where the creditors executing should add the words "without release," amounted to a provision for the rateable payment of all the assignor's debts, and was valid.

INTERPLEADER issue to try whether certain goods, seized in execution by the Sheriff of York and Peel, under a *fi. fa.* tested the 15th of October 1859, and delivered to him on that day, for having execution of a judgment recovered by the defendants in a suit against P. J. O'Neill and Alexander Cameron, were at the time of the delivery of the writ to the sheriff the property of the plaintiff as against the said defendants.

This issue was tried at Toronto spring assizes, 1860, before *Hagarty, J.* A deed of assignment bearing date September 12th, 1859, was proved to have been executed by Peter J. O'Neill to the plaintiff. The day following, plaintiff went to O'Neill's shop, and stated that O'Neill had assigned all to him, and he directed all sales to be stopped until he got a new set of books. O'Neill's book-keeper, who had been three

and a-half years with him, was then in the shop, and plaintiff told him all accounts were to be made in his (plaintiff's) name, that he would keep the book-keeper, one Archibald, and O'Neill as clerks, both to be paid weekly. Plaintiff furnished new books, and opened a bank account in his own name as assignee, and all cash received was deposited to his credit, and he paid all payments by his check, except trifles out of the till. The plaintiff was in the habit of coming to the shop three or four times a week. The invoices to purchasers were made out in plaintiff's name. O'Neill's name, however, was not taken down from the door. O'Neill's liabilities were about £11,000, and the assets were put down at £16,000. Archibald was a creditor for £90, and he executed the assignment as a creditor, releasing his claim on O'Neill thinking, as he stated, the assets would pay him in full. O'Neill was called for the plaintiff, and stated that he expected his estate would have paid from 17s. 6d. to 20s. in the pound; that he wished to put all his creditors on a par, and not to have the estate frittered away. That when he executed the assignment there were no judgments against him. He did not at the time of the trial think his estate would pay 20s. in the pound.

The assignment was filed in the office of the Clerk of the County Court on the 15th of September 1859. It was made between Peter J. O'Neill of the first part, Clara, his wife, of the second part, the plaintiff of the third part, and the several other persons, creditors of O'Neill, who should execute the same, of the fourth part. It assigned to the plaintiff, in the ordinary form, the real estate and other effects and property of O'Neill, upon trust to collect the debts due to him, and to sell and convert into money the said estate and effects, with power, among other things, to the plaintiff to employ O'Neill in winding up the business, and on further trust to pay all expenses of carrying out the trust; to pay salaries, allowances, wages, and hire; to retain five per cent. on all monies received, as a remuneration to plaintiff; to pay rateably, without preference, all the creditors of O'Neill, "parties hereto of the fourth part," who execute the deed of assignment; and lastly, to pay over the surplus, if any, to

O'Neill. Provided that the creditors coming in and taking the benefit of the deed do agree to accept the same in full satisfaction of their respective claims against O'Neill, and do release and acquit him for ever from the same, and from all actions, &c., in respect thereof; but it is declared that this provision shall not extend to any creditor executing the deed who shall after his signature add the words "without release," and as to all such creditors the deed shall be to all intents and purposes as if the provision for release had not been inserted. There are no other stipulations necessary to be stated. Several creditors executed the deed, one of whom added the words "without release."

For the defendants it was objected that the assignment was only for the benefit of the creditors who should come in and execute. That there was a resulting trust for O'Neill, the assignor, of any surplus, and that the release clause as drawn vitiated the assignment. It was agreed that the verdict should be entered for the plaintiff, with leave to the defendant to move to enter nonsuit or verdict for himself.

A verdict for the plaintiff and one shilling damages was entered accordingly.

In Easter Term *J. H. Cameron*, Q. C., obtained a rule *nisi* to set aside this verdict, and to enter a nonsuit or a verdict for the defendant on the leave reserved.

In the following term *Eccles*, Q. C., shewed cause. He stated that the same points had been taken against this assignment on the appeal from the County Court of a cause of *Feehan v. The Bank of Toronto*, when the appeal was allowed and the plaintiff was held not entitled to recover. He urged that any creditor might come at any time, for no time was limited, and that it was in the option of every creditor who came in to release O'Neill or not. Therefore this deed did not come within the provisions of the 18th sec. of chap. 26 of Consolidated Stat. U. C. A question was raised between the counsel whether it was open to the defendants' counsel to contend that there had been no sufficient evidence of change of possession. Nothing whatever was found by the jury, for nothing was submitted to them, and there was no agreement

at the trial that the court should be at liberty to draw inferences of fact from the evidence. The learned judge's notes do not shew that any question of this kind was raised.

*Cameron*, Q. C., for defendants, agreed that if on the evidence the court were of opinion the jury ought to have found a change of possession, that such a finding should be assumed. He argued that the assignment was void because no creditor was entitled to take any benefit from it who did not execute it, and that as to any surplus after the trusts were executed, it was expressly provided it should be paid over to the assignor. Suppose only a minority in value of the creditors, or only one of them, executed, O'Neill would receive back the surplus, and the whole of his estate and effects would have been protected from those of his creditors who had not executed.

DRAPER, C. J.—I am not disposed to lay much stress on the question of change of possession; there was evidence to go to the jury upon it, and if the defendants' counsel at the trial thought himself entitled to succeed upon that point, he ought to have asked the learned judge to take their finding on it instead of agreeing to the verdict with the leave reserved as to objections in point of law. In the case referred to, which was appealed, that very question was expressly found by the jury in the plaintiff's favour, and I think a similar finding would have been sustained by the evidence.

Then as to the question under the statute. If we assume O'Neill to have been at the date of the assignment a person in insolvent circumstances, or unable to pay his debts in full, or that he knew himself to be on the eve of insolvency, its provisions apply, and they are, that if any such person makes a gift, conveyance, assignment, or transfer of any of his goods, &c., with intent to defeat or delay his creditors, or with the intent of giving one or more of his creditors a preference over his other creditors, or over any one or more of such creditors, every such gift, conveyance, &c., shall be void, as against the creditors of such person. But it is provided that this enactment shall not make void any deed of assignment made for the purpose of paying and satisfying rate-

ably and proportionably, and without preference or priority, all the creditors of the debtor their just debts.

This provision is in part a substitute for the want of some law in the nature of a bankrupt law. Experience has abundantly proved that in the absence of any such law assignments of a debtor's estate, real or personal, have been frequently used as expedients to protect the property from execution, while really leaving the debtor the control and benefit of it, or as a means of giving priority and preference to friendly creditors, by paying them at the expense of others, or as a method of extorting a release from creditors, by the risk of their otherwise getting nothing unless by recourse to the very uncertain and unsatisfactory remedy of having their debtor committed to close custody, or confined upon the gaol limits, remedies of little or no practical value from the course which legislation has taken in respect to imprisonment for debt.

In like manner the legislature have deemed it advisable to avoid any confession of judgment, *cognovit actionem*, or warrant of attorney to confess judgment given voluntarily, or by collusion with a creditor to defeat or delay other creditors wholly or in part, or with intent to give one or more of the creditors of the party giving the confession, &c., a preference over his other creditors, or over any one or more of them.

It has recently been brought under our consideration whether under the former of these two provisions a creditor, who has recovered judgment and issued execution against the goods of his debtor without result, can take an effectual and valid assignment of debts due to his debtor for his own payment, if by so doing he will obtain a preference or priority over any other creditor who might by due legal proceeding have reached those same debts and attached them for his own benefit, and though the first creditor might have made use of the same legal proceeding for his own satisfaction. It has been said that if such an assignment is upheld it will give the assignee a preference over the other creditor, and as it must have that effect, the intention to give it will in law be presumed, and then the assignment

falls within the express words of the statute. That a man is to be presumed to intend the necessary consequence of his own acts is well settled—(Newton v. Chantler, 7 Ea. 138; Graham v. Chapman, 12 C. B. 103, per *Jervis*, C. J.) But I think that cases may arise in which it may well be determined that the true spirit and intention of the statute has not been contravened, although the facts proved may come within its express letter.

In this case there is nothing to prevent every creditor of O'Neill's coming in and obtaining, according to circumstances, either payment in full or a rateable proportion of his debt. Any delay in coming in is the creditor's own delay, and there is no period named in the deed after which a creditor is debarred from coming in and claiming a right to participate in the distribution. The trustee may, it is true, experience difficulty from this cause, and until all the creditors have come in, or those who do not have in some way distinctly refused, he may find it unsafe to pay any one creditor more than a sum proportioned to the amount due him, as compared with the whole amount due to other creditors. But that difficulty will not, that I can see, make the deed void; the declaration of trust being in favour of such creditors only as become parties to it, ought no more to make the assignment void under the statute than if the trust were created in favour of every creditor who should sign a receipt for the money paid to him by the trustee, for every creditor who executes is enabled to preserve a right to claim his full demand against O'Neill if the trust fund prove insufficient to satisfy it. It would be too much to say that the deed is void unless each creditor who executes it releases O'Neill, or if he expresses the contrary at the time of execution, unless the release in the deed would, upon some legal principle, so operate notwithstanding the contrary is expressed in the manner pointed out by the deed, and that has not been suggested. Whether the creditor executing the deed agrees to release or not makes no difference as to his claim to be paid, and can afford no ground for treating the deed itself as giving any creditor a preference over others. And the absolute refusal of any creditors to come in and execute would be

their own act, and any advantage thereby accruing to those who did execute would arise from such refusal, not from the provisions of the deed.

Upon the whole, I am of opinion that this deed should be construed as providing for the rateable satisfaction of all O'Neill's creditors, and therefore that this rule should be discharged.

*Per cur.*—Rule discharged.

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SMITH ET AL. V. MITCHMORE.

*Stat. 12 Vic., ch. 24—Patent.*

Upon an action brought for the infringement of a patent right,

*Held* that stat. 12 Vic., ch. 24, sec. 16, only requires the date of the patent to be stamped on articles sold or offered for sale, and does not make such stamping *per se* amount to a license to use the invention.

The declaration set forth that the plaintiff Smith had obtained letters patent, dated 6th December 1854, granting unto him the full and exclusive liberty of making, constructing, using, and vending for 14 years, within the Province of Canada, a certain invention of a new and useful improvement in the construction of portable or stationary steam and water saw mills. That before, &c., he assigned and sold to the plaintiff Fitch one-half of all the right, title, claim, and interest which he had in the said invention under the letters patent to be held jointly with them. That after the granting of letters patent, and the making the assignment, and within the term of 14 years, the defendant infringed the patent right.

*Pleas*—4. That after the 30th of May 1849, and after the issuing of the patent, a steam saw mill, now in possession of defendant, was constructed, *in some parts thereof upon a method or plan resembling to some extent the plan or method for which Smith obtained the patent*, and thereupon Smith stamped upon such mill the date of the patent, *and licensed the use thereof*, and by such stamping designated such mill as an article legally and properly to be used without thereby

infringing the patent. Wherefore defendant thenceforth used the same as he lawfully might by such leave and license, which are the very same identical grievances complained of.

5th. On equitable grounds, that before, &c., and after the 30th of May 1849, plaintiff Smith built or directed and superintended the building of the works of a certain steam mill for one Swift, to be when completed Swift's absolute property, which he was at liberty to use, and did use, with Smith's consent; the works of which mill were by the direction of Smith constructed on the plan and principles of and embodied the invention for infringing whereof this action is brought, and the plaintiffs, contrary to the statute, omitted to stamp on said works so constructed the date of the patent, or in any other manner to designate the said mill, or the works, or any portion thereof, as patented, wherefore defendant having seen such unstamped mill and works, and being deceived by the misconduct of plaintiffs in not stamping, &c., into believing that said saw mill or works was and were not the subject of the patent, contracted with one T. N. & G. N. to build for him a steam saw mill containing works similar to those in Swift's saw mill, which has been completed for defendant at great expense to defendant, and that defendant was during all that time ignorant that such construction, or that the mill when constructed, would be an infringement of the said patent, which are the very same identical grievances in the declaration mentioned.

Demurrer to the fourth plea. That it did not allege that defendant had obtained the license of the plaintiffs or of Smith to use the said invention otherwise than from the fact that Smith had stamped it, and that the 12th Vic. ch. 24, sec. 16, only requires the date of the patent to be stamped on articles sold or offered for sale, and does not make such stamping amount to a license to use the invention, and that the plea only pleads evidence.

Demurrer to the fifth plea. That the 16th sec. aforesaid makes the omission to stamp a misdemeanour, but does not afford an excuse for the infringement of the patent right in such articles if unstamped.

*Anderson* for the demurrer.

*R. Martin*, contra, cited *Bensley v. Bignold*, 5 B. & Ald. 335; *Ashby v. Bates*, 15 M. & W. 593.

DRAPER, C. J.—The words of the act 12th Vict. ch. 24, sec. 16, are that all patentees and assignees of patents shall stamp, engrave, or cause to be stamped and engraved on each article vended or offered for sale the date of the patent thereof, and any patentee or assignee neglecting so to do shall be deemed to have committed a misdemeanour, and shall be liable to the penalties, &c. 14 & 15 Vict. ch. 79, sec. 7, enacts that if any person without the consent of the patentee, his assigns, or other lawful representatives, first obtained in writing, makes or manufactures for sale any article or composition so invented, or makes or manufactures or makes use of any instrument or machinery so invented or specified, the exclusive right of which has been secured to any person by patent, the person so infringing such patent shall be liable to an action for the same, in which, besides such damages as may be awarded by the jury, the party injured shall also recover treble costs. See 12th Vict. ch. 24, sec. 2-12.

In the fourth plea the defendant admits that he had in his possession a saw-mill which was constructed in some parts thereof upon a method or plan resembling to some extent the plan or method for which plaintiff had a patent, and avers that plaintiff stamped upon such mill the date of the patent and licensed the use thereof, and by such stamping designated the mill as an article legally and properly to be used without infringing the patent, and avers that thenceforth he did use it by such license, which is the wrong complained of.

Taking the whole plea together, it must be construed to admit an infringement of the patent, unless the license pleaded justifies the user complained of as the infringement. Now, first of all, I think that the plea really means that the stamping operates as a license, though it is capable of the construction that the plaintiff stamped the mill and also licensed the use of it, for though this would make the plea double, that is only an objection to be taken on special

demurrer. But the stamping is by the statute only required on articles vended or offered for sale, and therefore as this was neither vended nor offered for sale, so far as the plea shews, the stamping derives no efficacy from the act. I see no ground then for holding that stamping *per se* constituted a license to use, and if the defendant relies on an averment of a license independent of the stamping, then under the 7th sec. of 14 & 15 Vic. ch. 79, the license must be in writing, which is not averred. So the plea is bad on either construction.

As to the fifth plea. *Bensley v. Bignold* (5 B. & A. 335) would be like this case if the plaintiff were suing for the price of a mill sold by him which he had not stamped or engraved. In that case *Abbot*, C. J., says—"A party cannot be permitted to sue either for work and labour done or for materials provided where the whole combined form one entire subject-matter made in direct violation of the provisions of an act of parliament." This plea, however, relies upon a very different state of facts. The defendant sets up what may have been a mere casual and accidental omission on the plaintiff's part as an excuse for infringing the plaintiff's patent. He does not affirm that he was in ignorance of the plaintiff's patent, and that the mill which he saw was constructed in accordance with it; he admits that he had notice (for I think that is the meaning of the introductory part of the plea) that the plaintiff had constructed the mill which he (defendant) saw in Swift's possession, but he says—"Being deceived by the said misconduct of the plaintiff in not stamping or otherwise designating as articles or as an article constructed according to his said patent the said saw mill or the works thereof, or some portion thereof, into believing that the said saw mill was not, and that no part thereof, or of the works thereof, was the subject of the said patent," he did the act complained of. In this circuitous mode of stating his belief, if it can be treated as an assertion of belief, he indirectly admits a knowledge that the plaintiff had a patent—at least such an admission is as much involved in the words used as is the assertion of defendant's belief that the mill he saw was not the subject of "the said patent."

If the defendant desired it, he could have easily set up that he saw a mill in Swift's possession which was in no way marked to shew that it was patented, that he had no notice or knowledge that it was patented, and that in the *bona fide* belief that it was not patented he procured a similar mill to be constructed for himself, for which the plaintiff is suing him as an infringement of his patent. Probably it was thought if the plea stopped here it would be no answer in equity, considering the terms of the statute. Therefore it proceeds to set up that the plaintiff was the guilty cause of the defendant's act, by committing a misdemeanour against the 16th sec. of 12th Vic. ch. 24. But it does not allege in express terms, nor I think by necessary implication, that the plaintiff had neglected to stamp or engrave upon a patented article, "vended or offered for sale," the date of the patent thereof. If it be necessary to raise the alleged equity to charge the plaintiff with the misdemeanour, I think it insufficiently done, and without such charge I think the plea bad. I may add, that if the plea were taken to contain what the defendant's counsel at the argument contended, I should still think it insufficient to found an unconditional and perpetual injunction.

*Per cur.*—Judgment for demurrer.

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### RITTINGER V. MCDUGALL.

*Assignment—Attaching Order—Right of Assignee to Intervene.*

Judgment was recovered by B. & Co. against defendant, against whom plaintiff afterwards likewise recovered judgment; B. & Co. put the first *fi. fa.* into the hands of the sheriff against defendant's goods. Then plaintiff put a similar writ into the sheriff's hands, who shortly after the receipt thereof returned to *nulla bona*. Plaintiff then obtained an order for defendant's examination touching debts due to him, &c., and very shortly after being served with such order defendant assigned his book debts, accounts, and claims to B. & Co.; a few days after plaintiff obtained the usual order to attach debts due to defendant, but it was not shewn that any summons issued calling on the garnishees to pay to plaintiffs the sums they owed to defendant. B. & Co. applied to set aside the attaching order.

*Held* that they had no right to intervene in the cause, and that they could not raise the question of the validity of the assignment to them on such an application.

A rule *nisi* was granted in this cause on motion of Mr.

*A. McNabb*, counsel for Buntin & Co., calling upon plaintiff and defendant to shew cause why the attaching order issued in this cause should not be set aside on the ground that the debts attached were assigned to Buntin & Co. before the attaching order was obtained, and that the plaintiff was aware of that fact.

The application had come before Sir *J. B. Robinson*, C. J., in chambers, who referred the parties to the full court—the original summons, which was returnable before the Chief Justice, having been issued by *Burns*, J., on the 15th of August 1860. The summons was granted upon affidavits, stating that on or about the 24th of October 1859 an execution was issued against the defendant McDougall at the suit of Alexander Buntin, James Buntin, George Boyd, and John Young Reed, directed to the sheriff of Waterloo, and delivered into his office about the 25th of October 1859. That the plaintiff's writ of *feri facias* was afterwards handed to the sheriff; that after the defendant had assigned his book debts to Buntin & Co. the sheriff returned their execution at the instance of their attorney "*nulla bona*," and that on the 11th of August 1860 the plaintiff obtained an order attaching certain debts due to the defendant. A sworn copy of the assignment from the defendant to Buntin & Co. was also produced. The assignment bore date the 4th of August 1860, and stated that in consideration of £259, 6s. 5d., being the amount of an execution issued against him by Alexander Buntin & Co., he had granted, bargained, sold, assigned, and set over unto the said Alexander Buntin & Co. all and singular his book debts, accounts, and claims whatsoever due and owing by any persons, to secure to them the said sum of £259, 6s. 5d. with legal interest, provided that upon payment of the said sum to them with interest, or upon the collection by them of sufficient of such debts to liquidate that sum with interest, the assignment should be void. And the defendant appointed the said Alexander Buntin & Co. his attorneys to collect the said debts.

In reply the plaintiff made an affidavit stating that on the 17th of March 1860 he obtained a judgment against the

defendant for £133, 6s. 6d. debt, and £29, 14s. 2d. costs, and issued a *fi. fa.* which on the 24th of July 1860 was returned *nulla bona*. That the writ of summons in this action was sued out before that of Alex. Buntin and others, but they got their writ served on defendant, who evaded service of the plaintiff's writ for a time sufficient to throw him over the then next assizes. That the defendant suffered judgment by default in Buntin's suit, but entered a defence in this action. That on the 31st of July 1860 an order was obtained in this cause to examine the defendant orally, which, with an appointment of time and place for examination, was served on the defendant on the 2nd of August, and after that service the defendant made the assignment of his book debts to Buntin & Co. That when defendant made this assignment he was and still is in insolvent circumstances, and he thereby made over property with intent to defeat or delay his creditors, or with intent of giving Messrs Buntin & Co. a preference over the plaintiff. That the plaintiff verily believes that this assignment was fraudulently made to prevent the plaintiff from "*garnisheeing*" his accounts, and consequently with intent to defeat or delay his creditors. That the plaintiff on the 11th of August 1860 obtained an order for attachment of debts due to defendant by the several persons named in the entitling of the order (79 names), and by virtue of the order had attached about \$300 worth of debts due to defendant, all or nearly all of which, as plaintiff thinks, having been incurred since the passing of the act to prevent preferential and fraudulent assignments. That the plaintiff's claim is for wages due to him as foreman printer to defendant, and his only hope of recovering anything is by virtue of the attaching order.

A copy of the examination of the defendant taken before the deputy-clerk of the Crown and pleas for the county of Waterloo was put in. Among other things the defendant states that his sister-in-law has a lien on his book debts for \$500 or thereabouts given by indenture of bargain and sale made the 19th of February 1858; that there is also a lien in favour of Buntin & Co. to secure the payment of the execution above mentioned, which was given on Saturday

the 4th of August 1860, since the service of the order for examination; that he did not then give up the books to Buntin & Co., because he was advised to produce them in obedience to that order, and that he gave this lien to Buntin & Co. for no other reason than to secure the payment of a just debt, and to prevent the "*garnisheeing*" his accounts, which would have been injurious to his business. The account books shewed the names of about two hundred debtors averaging three dollars each. The defendant also stated that he was publisher of a newspaper and got his supply of paper from Messrs Buntin & Co.

*S. Richards*, Q. C. shewed cause. He relied upon the 22 Vic. ch. 96, sec. 19; Consol. Stat. U. C. ch. 26, sec. 15. Questioning also the right of the applicant to intervene in this way. The 291st, 295th, and 296th secs. of ch. 22, Consol. Stat. U. C.; *Hirsch v. Coates*, 18 C. B. 757; *Wintle v. Williams*, 3 H. & N. 288; *Westoby v. Day*, 2 E. & B. 605.

DRAPER, C. J.—The clause of the statute referred to is as follows:—"In case any person being at the time in insolvent circumstances, or *unable to pay his debts in full*, or knowing himself to be on the eve of insolvency, makes or causes to be made any gift, conveyance, assignment, or transfer of any of his goods, chattels, or effects, or delivers or makes over, or causes to be delivered or made over, any bills, bonds, notes, or other securities or property with intent to defeat or delay the creditors of such person, or with intent of giving one or more of the creditors of such person a preference over his other creditors, or over any one or more of such creditors, every such gift, conveyance, assignment, transfer, or delivery shall be null and void as against the creditors of such person, but nothing herein contained shall invalidate or make void any deed of assignment made and executed by any debtor for the purpose of paying and satisfying rateably and proportionably, and without preference or priority, all the creditors of such debtor their just debts, and nothing herein contained shall invalidate or make void any

*bona fide* sale of goods in the ordinary course of trade or calling to innocent purchasers."

The important facts brought forward by the affidavits are these:—On the 24th of October 1859 a *fi. fa.* against goods was issued by Buntin and others (the parties moving this rule) against the defendant McDougall, which writ was delivered to the sheriff of Waterloo on the following day.

On the 17th of March 1860 the plaintiff obtained judgment against the defendant in this cause, and issued a *fi. fa.* against goods, which on the 24th of July 1860 was returned *nulla bona*.

On the 31st of July a judge's order was made for the examination of McDougall before the deputy-clerk of the Crown in the county of Waterloo, which was served on McDougall on the 2nd of August.

On the 4th of August the defendant, by deed-poll, in consideration of the sum mentioned in their execution against him, granted, bargained, sold, &c., to Buntin & Co. all his book debts, accounts, and claims to secure to them payment of the said sum, subject to a proviso for making such deed void on payment of the debt and interest. By this deed McDougall constituted Buntin & Co. his attorneys to collect such accounts. On the 6th of August 1860 the defendant was examined pursuant to the order of the 31st July, and stated that his sister-in-law had a lien on his account books for recovering \$500, by an indenture dated the 19th of February 1858, and that Buntin & Co. had a lien given to them on the 4th of August, which he gave to them for no other reason than to secure the payment of a just debt, and to prevent the "*garnisheeing*" his accounts, which would be injurious to his business.

On the 11th of August the plaintiff obtained the usual order to attach debts under the C. L. P. Act, sec. 194, against McDougall, the defendant.

On the 15th of August a judge's summons was issued to set aside the attaching order of the 11th of August, at the instance of Buntin & Co., on the same grounds which they urge in support of this rule, and on the return of this summons before the Chief Justice of Upper Canada he directed them to apply to the court in banc.

Shortly after the assignment to Buntin & Co. their execution against the defendant McDougall was returned *nulla bona*.

No summons calling on the garnishees to pay the plaintiff the debts due by them to McDougall is shewn to have issued. Neither is it shewn that they have in any way been notified of the assignment to Buntin & Co.

Before determining the principal question raised we must see whether the applicants have any right to make this application, and to intervene in the proceedings in a cause to which they are not parties.

The proceeding to attach debts is warranted by law, and it is not objected that it has been irregularly taken if these applicants could be permitted to raise a mere question of irregularity. The objection really is that it interferes with or threatens to interfere with the assignment made to Buntin & Co., by compelling the debtors of the defendant, whose debts are the subject of the assignment, to pay those debts to the plaintiff.

Supposing that in point of law this attaching order nullifies the assignment by force of the statute referred to, then I do not understand upon what ground we can deprive the plaintiff of an advantage he has gained by a regular proceeding taken without fraud or unfair practice on his part. If, on the contrary, the assignment is valid, and will afford to the garnishees an answer to any summons issued by the plaintiff calling on them to make payment to him, then it appears to me a more correct proceeding to leave them to dispute their liability—as under the 291st, 295th, and 296th sections of ch. 22, Consolidated Statutes, U. C., they have a right to do. The assignment, if valid, will be an answer to the plaintiff's demand (See *Hirsch v. Coates*, 18 C. B. 757), and its validity will then come directly in question, instead of being raised, as is now attempted by these applicants, in a cause to which they are not parties, and in the absence of the garnishees.

I think it better, therefore, to abstain from giving any opinion on the question whether the assignment to Buntin & Co., under all the circumstances of the case, comes pro-

perly within the spirit of sec. 18 of ch. 26 of Consol. Stat. U. C., as it certainly appears to come within its letter. There would, I apprehend, be no appeal from our decision by either party, and the losing side might desire to have the construction of the act determined by the highest authority.

In my judgment this rule should be discharged on the ground that the applicants are not strictly entitled to raise the question in this shape.

*Per cur.*—Rule discharged.

## NORTH AND TURNBULL V. THE BRANTFORD SCHOOL TRUSTEES.

*Joint Contract—Order by one contractor—Payment for both.*

The plaintiffs entered into a joint contract for the performance of certain work for the defendants, to be paid monthly as the work progressed; the defendants, through their treasurer, opened accounts and paid moneys on orders, making the cheques payable to North & Turnbull, which cheques were endorsed sometimes by North and sometimes by Turnbull, in the name of "N. & T."

Upon an action brought for a balance of \$496 81, the defendants pleaded a tender before action and payment into court of \$256 81, and an order and payment thereunder in the following words:—"Brantford, 31st July 1858. Allan Cleghorn, Esq. Reserve \$300 from the Central School, payable to Ritchie & Russell. North & Turnbull." This was signed by Turnbull.

*Held* that the payment thereunder was a payment on account of the plaintiffs, and could not be recovered again.

DECLARATION on an agreement whereby plaintiffs covenanted to build a school house for defendants according to a plan and specifications, and defendants under their corporate seal covenanted to pay plaintiffs £1681, in monthly payments as the work should progress, reserving ten per cent. of the estimate of the architect, the monthly payments to be made within the first ten days of each month, commencing in July 1857, and to pay the balance on the completion of the building by the 1st December 1857.

*Averment* that in June and July 1857 plaintiffs did work amounting to £200 in each month, yet defendants did not pay, &c.

*Averment* that in August 1857 plaintiffs did further work amounting to £321, 5s., yet defendants did not pay, &c.

Similar averments of work in September 1857, £187, 5s., in October 1857, £135, in November £141 15s., and non-payment.

*Averment* of work done in January, February, March, April, May, June, July, August, September, October, November, and December 1858, and in January, February, March, April, and May 1859, and that plaintiffs on the 20th of May 1859 finished the work, except the tower, to the satisfaction of defendants' architect, and that defendants neglected to pay.

Special damage by reason of defendants' neglect to pay.

Common counts.

*Plea 1.* Payment except as to \$246 81, and as to that sum, tender before action, and bring the same into court.

2. As to the 1st, 2d, 3d, 4th, and 5th breaches, except as in the introductory part of the last plea is excepted, that plaintiffs did not perform large portions of the work during the respective months in those breaches mentioned, nor did defendants' architect estimate as in those breaches mentioned, nor did defendants refuse to pay the said several sums mentioned.

3. To the sixth breach, except as before excepted, traversing the performance of the work according to the agreement, and claiming the forfeiture of the ten per cent. by reason of such non-performance.

4. Denial that the whole was finished on 20th May.

5. Denial of special damage.

6. Not guilty.

The trial took place at Brantford in April 1860 before *McLean, J.* It was admitted plaintiffs were entitled to the sum of \$7552 17, and the defendants insisted they had paid it. The plaintiffs gave credit for \$7055 36, and claimed a balance of \$496 81. Of this the defendants had paid \$256 81 into court, and the plaintiffs still claimed a balance of \$240. The defendants then proved a tender of \$256 81, as pleaded, and it further appeared that the plaintiff Turnbull drew an order or instrument in the following terms:—"Brantford, 31st July 1858. Allan Cleghorn, Esq.

Reserve \$300 from the central school, payable to Ritchie & Russell. North & Turnbull." Mr Cleghorn was chairman of the board of school trustees. Prior to the date of this order each of the plaintiffs had a separate account with Ritchie & Russell, and desired further credit from them. Ritchie & Russell required a guaranty, and told both of the plaintiffs they would take the guaranty of the board of school trustees. Turnbull went to Mr Cleghorn and told him they (plaintiffs) could not get on and pay their men unless they got an order on some of the grocers to advance, and in consequence the order above set forth, signed by Turnbull, with the names "North & Turnbull," was given, and then Turnbull got credit from Ritchie & Russell for groceries. The moneys of the board of school trustees were placed in the hands of their treasurer, and were paid out upon cheques drawn by Mr. Cleghorn, the chairman. These cheques were drawn in favour of North & Turnbull, and were endorsed sometimes by one, sometimes by the other of them. On receiving this order from Turnbull Mr. Cleghorn gave an order on Ritchie & Russell to advance goods to North & Turnbull to the amount of \$300, and they furnished goods to the amount of \$241 to Turnbull, and to men in the employ of North & Turnbull. Turnbull absconded in April 1859, before the building was finished. At that time he owed Ritchie & Russell \$70 on his own private account, for which they had no guaranty. The \$256 81 was tendered to North, and he objected to allowing this order, saying that Turnbull had no authority from him to draw. It appeared that North had on more than one occasion signed the names of North & Turnbull on cheques. Mr. Cleghorn was told by North before Turnbull went away that he would not sanction the payment of that amount—that Turnbull had no authority to give the order. Part of the \$300 was paid to Ritchie & Russell on 23rd December 1858, and the balance, \$240, on 17th June 1859.

The learned judge charged against the plaintiffs, stating that each contractor had a right to receive the money, and the other must be bound by the payment. That the question was not whether an action could not be maintained against

the defendants or their chairman, on the authority given to Ritchie & Russell, but whether the defendants had authority from plaintiffs to retain the \$300 from the moneys becoming payable to the plaintiffs for the use of Ritchie & Russell, and the learned judge directed that they had such authority, and that after Ritchie & Russell had parted with their goods on the strength of it, one of the plaintiffs could not, by denying the authority of the other to make the arrangement, and forbidding the payment in pursuance of it, sustain this action. The jury found for the defendants.

In Easter Term *M. C. Cameron* obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law and evidence, and for misdirection of the learned judge in not telling the jury that the defendants, not being liable to Ritchie & Russell, the plaintiffs, or either of them, had a right to countermand the order made in their favour, and that such order would only extend to an amount due by the plaintiffs jointly, and not to a demand against them severally, and that under the circumstances the order signed by Turnbull was in fraud of North.

In Trinity Term *Freeman*, Q. C., shewed cause, referring to *Brandon v. Scott*, 7 E. & B. 234; *Solomon v. Nissen*, 2 T. R. 674.

*M. C. Cameron*, contra, cited *Williams v. Everett*, 14 East. 596; *Wharton v. Walker*, 4 B. & C. 163; *Rodick v. Gandell*, 1 De Gex., McN. & G. 763.

DRAPER, C. J.—I am of opinion the rule should be discharged. The contract was jointly made by the plaintiffs for the performance of the whole work, and the attempt made at the trial to set up by several witnesses that there were in effect two contracts, one by Turnbull to do the carpenter's work, and the other by North to do the mason's work, was an idle attempt to mislead the jury, and met with its proper fate. Both plaintiffs used the name of the two to sign and endorse papers when necessary in the carrying on the business, and the right of the plaintiffs to recover is now rested, not so much on the absence of authority on Turnbull's

part to sign the names "North & Turnbull," as on North's right to countermand the order given by Turnbull.

The facts material to be considered are the professed inability, or at least difficulty, the plaintiffs felt in getting on with the contract, and the representation of this to the chairman of the defendants, Mr Cleghorn, in consequence of which he wrote a letter (produced at the trial) as follows:—

"Messrs Ritchie & Russell, Brantford. Gentlemen,—I have had intimation from Messrs North & Turnbull to reserve for your account the sum of three hundred dollars out of funds coming to them from their contract for the addition to central school, which will be duly placed to your credit when received. Brantford, July 31st 1858. (Signed) Allan Cleghorn, chairman," &c.

It was sworn at the trial that the plaintiffs both wished further credits on their respective accounts with Ritchie & Russell, and they were told they could not get further advances without a guaranty, and that Ritchie & Russell would accept the guaranty of the defendants, and that thereupon Turnbull obtained and gave them the above written letter. It is true the advances made by Ritchie & Russell were to the account of Turnbull only, but there is evidence to shew the advances were to men employed in the executing the work that North & Turnbull jointly contracted to do, and as the one appears to have done the carpenter work, and the other the mason work, the thing is intelligible and consistent. It shows that in fact there was no fraud on Turnbull's part in getting for his exclusive use funds which should belong to himself and North, if indeed that could make any difference as to third parties not lending themselves to any fraud whatever.

I think on this the jury might well consider, not simply that Turnbull as a partner had signed the partnership name to the order on Mr. Cleghorn, but that the undertaking given to Ritchie & Russell was given at the request both of North and Turnbull, and that both of them were parties to and concurred in that arrangement. As a consequence, if there be any moral fraud, it appears as much in North's endeavour to defeat the arrangement and get the money from the

defendants, who have once paid it to Ritchie & Russell in pursuance thereof; moreover, after the order was given, Ritchie & Russell made further advances to Turnbull and to workmen employed by him, and as I gather upon his order and authority, to the extent of \$241, no part of which is shewn to have been advanced after Turnbull absconded or after North countermanded the order.

It is satisfactory to think that in denying this claim we are sustaining what is right under the circumstances, and are warranted by authority as to the question of law. I do not think the case has been successfully distinguished from that of *Brandon v. Scott*, 7 E. & B. 234. Turnbull himself never could succeed, if suing alone, in recovering from these defendants money paid by them at his request on the facts shewn, and as said by *Coleridge, J.*, "Where a person is disabled from suing alone he cannot enable himself to sue by joining others as co-plaintiffs."

*Per cur.*—Rule discharged.

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### WILDE V. CROW ET AL.

#### *Trover—Excessive damages—Affidavits.*

In an action of trover, damages being laid in the declaration at \$8000, and the jury having found a verdict for \$10,548, on the motion for a new trial for excessive damages, held that though the plaintiff is limited to the amount of damages laid in the declaration, the defendant is not on that account alone entitled to a new trial, or because the damages must necessarily be deemed excessive. It is for the plaintiff to get rid of the difficulty occasioned by the verdict exceeding the amount laid in the declaration.

2nd. That affidavits sworn before an attorney who is a partner of counsel engaged in the cause, but not otherwise connected therewith, may be read.

TROVER for the steamer *Despatch*, engine, machinery, boilers, tackle, apparel, boats and furniture; damages claimed £2,000.

Each of the defendants, by the same attorney, severally pleaded not guilty, and all joined in a plea denying plaintiff's property.

The cause was tried at Chatham in April last before *Richards, J.* The jury found a verdict for the defendants

David, John, and Andrew Crow, and against the other two defendants, with \$10,548 damages.

*Eccles*, Q. C., in Easter Term, obtained a rule *nisi* on behalf of the defendants Thomas Crow and Thomas Crow the younger, for a new trial without costs, the verdict being contrary to law and evidence, and for excessive damages, and on the grounds disclosed in affidavits filed, and because the damages assessed exceeded those laid in the declaration.

The defendant Thomas Crow filed a long affidavit setting up that in 1851 he was a part owner of this steamer, then a British bottom, having  $\frac{1}{11}$ th shares. That the plaintiff and one Isbell, both naturalised citizens of the United States, owned the rest. He then represented that they fraudulently and collusively got her seized in Detroit for an alleged infraction of the revenue laws of the United States; that Oliver M. Hyde, then collector of the Port at Detroit, was a party to the seizure; that the vessel was condemned and sold, and that plaintiff had since become sole owner, though she is mortgaged. The steamer was sold under the condemnation for only \$700, and the mortgages are—1st, dated the 1st of April 1853, for \$1000; 2nd, dated March 1853, for \$2770, and one dated the 10th of June 1858, for \$4500; that the greater portion of the plaintiff's witnesses were examined upon a commission in the United States against his wish; that he was prepared with abundant evidence at the trial to rebut the extravagant value put upon the vessel by the plaintiff's witnesses, but his counsel relied on the fact that the vessel had been sold for \$700 and upon some indirect evidence to prove that the deponent had an interest in her; that the steamer was old, built as he believes about 20 years ago; her hull rotten; required two men constantly at the pumps to keep her afloat; that she has now the same engine and boilers that were put into her when originally built, and which were then old. Several other affidavits were filed to establish that the value of the vessel was not half the amount of the verdict; among them one of Thomas Crow:—That Walter McCrae was employed by him as his attorney in this cause; that he was in posses-

sion of a certificate of the registration of that portion of the Despatch belonging to the deponent, and refused to produce it at the trial; that several engineers and owners of steam-boats were in attendance at the trial for the defence, but McCrae called none of them; and that John Stewart, who drew the conveyance to deponent of a portion of said vessel, was also present, but McCrae refused to have him examined.

*Albert Prince* shewed cause. He asked leave in the first instance to remit the amount of damages given by the jury in excess of the damages laid in the declaration. He objected that the defendant Thomas Crow's affidavit shewed all his witnesses might have been called at the trial—citing *Spong v. Hog*, 2 W. Bl. 802. As to granting a new trial in an action of tort for excessive damages, he cited *Williams v. Currie*, 1 C. B. 841, and *Creed v. Fisher*, 9 Exch. 472.

He also filed affidavits to establish that the damages were not excessive.

*John G. Kolfage*.—That the plaintiff in 1857 owed him about \$1000 for wood supplied for the Despatch, and defendant attached the boat; that plaintiff delivered to him a part of the machinery as security, and afterwards gave him other sufficient security when deponent returned the machinery to him, and that plaintiff has since paid him.

*George Jerome*.—Confirmed Kolfage's statement. That he bought the boat under the sale made by authority of the United States Admiralty Court; that he paid many debts due on the boat; that he sold her to plaintiff; that she was worth \$10,000.

*Oliver M. Hyde*.—Contradicted the affidavits of Thomas Crow and George Coveyon as respects his being a party to any conspiracy or fraud, and gave his own account of the seizure and condemnation, and of his first acquiring any lien or claim on her. Valued the Despatch in spring of 1859 at \$10,000.

*Affidavit of plaintiff*.—That he had no interest in this boat until after her condemnation and sale for breach of the revenue laws in 1851; and that when he purchased from the parties claiming title under that sale he did not know Crow

had any interest in her; that in the winter and spring of 1856 he made extensive improvements in the *Despatch*, principally on her machinery, amounting to \$4,700. Confirmed Kolfage's statement that in the winter and spring of 1857 George Jerome purchased large claims against him on account of the steamboat; that in the spring of 1859 the steamboat was libelled in the Admiralty Court of the United States for wages due seamen, &c., &c., and under process of that court was sold to Jerome for \$750. No one bid against Jerome, because it was well known he had heavy claims against the boat, and would run up the price sufficiently to cover them. That afterwards, and in the summer of 1858, Jerome deeded her to plaintiff on his paying part and giving a mortgage on the boat for \$4,500. As to Wm. D. Eberts, about the split shaft—that he did not put it into the *Despatch*, but used the sound part and had a new shaft forged on; that having had the engine thoroughly repaired (some engineers who made affidavits swearing they had put in the most modern improvements), he built a new hull to receive it, which new hull is sunk for preservation since defendants seized the *Despatch*.

In reply to these affidavits the defendants' counsel tendered the affidavit of John Stuart, Esq., the five first paragraphs of which are in contradiction of the affidavit of Lewis Ives, impeaching his veracity by stating conversations at variance with his affidavit; but he could get no new affidavit from him because he was indebted to Oliver M. Hyde, who he considered was the real plaintiff in the action, and who he feared would press him. The sixth paragraph states that a large number of the affidavits filed for plaintiff are sworn before R. B. Bernard, "the law partner of Albert Prince, Esquire, who was retained by the plaintiff as counsel at the trial of the cause." The seventh and eighth paragraphs relate to the affidavit of Curtis K. Dixon, stating that a matter sworn to by him on some other cause had been positively contradicted on oath. It appears from this affidavit that Mr Stuart is now *retained* in this action, whether as barrister or attorney is not stated. Mr McCrea still appears as defendants' attorney on the record, but no

attorney's name is endorsed upon the affidavits filed on obtaining the rule *nisi*.

*Eccles*, Q. C., supported the rule.

DRAPER, C. J.—As to the last affidavit, it appears to me of very little importance whether we receive it or not. The only point raised by it was as to the commissioner before whom about twenty-one of the plaintiff's affidavits are sworn. It has never yet, I believe, been held that if one of two attorneys who are co-partners [and who are also, as most of the profession here are, barristers-at-law] administers affidavits to persons in a cause with which he or his partner are shewn to have had at the time no other professional connexion than that his partner was retained as counsel at the trial of the cause, such affidavits cannot be read. I am not disposed to make the first decision to that effect. The reason applying to cases where two attorneys are partners, and where one of them is the attorney for one of the parties to a cause, and which prevents affidavits being taken before the other as a commissioner, has, I think, no application in a case like the present.

The facts of the case appear to be these:—The *Despatch* is a steamboat originally built and owned in Canada. The defendant Thomas Crow was a part owner. In 1851 she was seized for an infraction of the United States revenue laws, and was condemned and sold. After that the plaintiff became sole proprietor of her; that is, assuming that the purchasers under that condemnation and sale were her lawful owners. It was proved at the trial that according to the laws of the United States such proceeding made her an American vessel. Afterwards in 1858 there were many debts due by the plaintiff incurred on account of the vessel, some for seamen's wages, and for some of these proceedings were instituted in the Admiralty Court of the United States at Detroit according to what was proved to be the law there. This suit terminated in a decree ordering the *Despatch* to be sold for these debts, and she was so sold, and the sale confirmed by decree of the Admiralty Court. It was sworn

that the effect of these proceedings in the United States court was, according to their law, to vest a new and perfect title in the purchaser, and to extinguish all preceding titles and claims upon or to her. One Jerome, who represented a large amount of the claims on the Despatch, purchased her at the last sale for \$725. The small amount of the purchase money was endeavoured to be explained by the alleged fact, that having large claims on the Despatch it was well understood he would bid up her price to cover them, and therefore he was unopposed. After this sale Jerome transferred the boat to the plaintiff, taking a mortgage on her for \$4,500. All these transfers, mortgages, &c., were duly registered and enrolled according to the laws of the United States. And after all these transactions, the defendants, or rather some of them, seized her under colour of Thomas Crow's original interest in her as part owner. This case being left to the jury with a charge not excepted to, they gave a verdict for the plaintiff against two of the defendants, with damages \$10,548, and in favour of the other three defendants. The damages laid in the declaration were £2,000 or \$8,000.

The first question is, whether the plaintiff should be allowed, as he prays leave, to remit the excess of the verdict from \$10,548 to \$8,000. Unless it be, that if we refuse this application we must set aside the verdict and grant a new trial, which the defendants ask for, there appears no reason against granting the leave. The defendants on their general grounds of moving are entitled to whatever weight should be given to the fact that the jury gave a verdict so much larger than the plaintiff himself estimated his damages at; and to the inference that the plaintiff is aware the damages given are excessive, or he would not so readily consent to reduce them by the sum of \$2,548 or £637. On the other hand, the plaintiff suggests that he has no prospect of recovering the smaller sum, that the defendants are unable to pay it, and that the past delay has done him irretrievable injury, which will be aggravated, without any redress, if a new trial is granted on this ground. In *Usher v. Dansey* (4 M. & S. 94) (and see *Phillips v. Jones*, 15 Q.

B. 859) *Lord Ellenborough* reviews the cases on the subject of remitting such an excess as in the present case, and puts the authority of the court to authorise the amendment beyond doubt, shewing that it may be done even after error brought. I think the amendment would be allowed on a proper application, which this is not; for the present it is enough to say that it is no sufficient ground to grant a new trial. It presents a difficulty in the plaintiff's way which he must take the proper steps to remove.

Then as to excessive damages. I treat them as necessarily limited to the sum claimed in the declaration, for after what has passed no application on the plaintiff's part to amend his declaration by increasing the damages could or ought to be entertained. In the first place, no witnesses were called on the part of the defendant to rebut the testimony given for the plaintiff, which fully sustains the verdict. The answer given to this is, that the defendants' attorney is to blame. The witnesses were in court, but he would not have them called. We have no explanation from him on this point. Perhaps he acted to the best of his judgment, with a knowledge of circumstances which made him think it useless to call such witnesses as were present. Perhaps he is ignorant of the affidavit made by plaintiff, for enough appears to lead to the belief that this application is not made through the instrumentality of the attorney on the record for the defendant. But it must be a much stronger case than the present which would induce me to agree in granting a new trial on such a ground, though I do not mean to say such a case might not arise.

Looking, then, at the affidavits. Strong as they are on the defence, they are equally (at least) strong on the other side, and this not merely on the general expression of the value of the Despatch, but on the displacing some of the allegations relied on for the defendant, the negating of fraud, conspiracy, &c.; and on the facts of repairs and improvements sworn to include those of the most modern character by the parties who actually executed them or had full opportunities of knowing they were executed. If all the additional testimony contained in the affidavits before us

had been laid before the jury, I am not at all inclined to say we could have looked on the damages actually given as not borne out, and limiting the damages to \$8,000 more than borne out. And though there has been, as suggested, a great depreciation in the value of property of this kind, yet it is not from a defendant who in his affidavit places himself no higher than a wrongdoer, acting in an erroneous assertion of rights which he supposed he possessed, that we can receive this as a palliation of his conduct, or even as entitling him to much consideration at the hands of a jury who were not limited in giving damages to the actual value of the property, but might to some extent consider the actual injury inflicted on the plaintiff.

Lastly, there are three defendants for whom a verdict has been rendered, which, if this rule were made absolute, must be set aside. It is not shewn that this application is made with their consent, nor have they been served with the rule so as to be before us on this application. Their interest in the matter seems to have been entirely overlooked. If the case were a clear and strong one in favour of the other defendants, it might not be too late to remedy this omission, which would involve a further delay very injurious to the plaintiff, who certainly has so far shewn a right to recover a large sum by way of compensation for a wrong which it is not attempted to justify.

On the whole, I think this rule must be discharged.

*Per cur.*—Rule discharged.

See *Belcher v. Magnay*, 9 Jur. 475; *Doe v. Martin*, 13 M. & W. 811; *Ward v. Murphy*, 11 Q. B. U. C. 445; *Ferguson v. Adams*, 5 Q. B. U. C. 200, per *Robinson*, C. J.

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## STEVENSON ET AL. V. McLEAN.

*Guaranty—Joint liability under.*

One T. A. McLean contracted with two firms in Quebec, H. J. N. & Co. and M. S. & Co., for advances, to be covered by shipments of timber within a specified period, agreeing to furnish defendant's guaranty for performance of his part of contract. Defendant in a letter to M. S., a partner in one of the firms, guarantees that T. A. M. will furnish timber in the year 1859, equal in value to the amount of advances made by him M. S. to said T. A. M.

*Held* that joint action of M. S. and H. J. N. & Co. will not lie. 2nd. That in an action by M. S. alone he can only recover the amount of *his own* advances to T. A. M.

3rd. That M. S. must, as far as defendant is concerned, give credit for all lumber received by him from T. A. M.

This was an action brought upon a written guaranty signed by the defendant in the words and figures following:—

TORONTO, December 24th, 1858.

Michael Stevenson, Esq., Quebec,

SIR,—Understanding from my son, Mr. T. A. McLean, that he has made an arrangement with you for certain advances to be made to him in the course of his business from this time till next autumn, and that you require a guaranty that he shall deliver to you during the next season of navigation staves or timber sufficient to cover the amount of such advances, I hereby undertake that the said T. A. McLean shall deliver to you at Quebec such quantity of timber or staves as shall amount in value to a sum equal to the advances made to him not exceeding the sum of three thousand pounds.

I am, Sir,

Your obd't servant,

A. McLEAN.

The facts were as follows:—

Previous to the giving of the above guaranty, which was obtained by Mr. T. A. McLean from the defendant in Toronto, an agreement had been entered into without the knowledge of the defendant, and of which he had no notice, in the words and figures following:—

Memorandum of agreement between Messrs. H. J. Noad & Co., Thos. A. McLean of Orford, C. W. & M. Stevenson & Co. Messrs. H. J. Noad & Co., and M. Stevenson & Co. agree to advance Mr. McLean to the extent of twelve thousand dollars for the purpose of getting out oak timber and

staves during the present winter, say to the extent to cover all advances, including freight, commission, &c., to be forwarded and consigned to them as soon as possible on the opening of the navigation—the commission to be allowed thereon to be 5 per cent. on the sales of the lumber, and one per cent. brokerage, with interest as usual at the rate of 6 per cent. per annum, and for the purpose of securing the said advances Mr. McLean agrees to transfer to M. Stevenson & Co. a quantity of staves now on hand at Woodfield Harbour, say about thirty thousand merchantable standard, and ten thousand merchantable West India staves, or the proceeds of such staves, next spring, the same being at present in the hands of Messrs. Ryan; also a quantity of cull standard staves now in Montreal, and a further quantity on the shores of Lake Erie, the latter to be marked and culled during the winter; and further, Mr. McLean agrees to furnish a letter of guaranty from his father that he will fully carry out this agreement.

Quebec, 3rd Dec. 1858.

T. A. McLEAN.

H. J. NOAD & Co.

M. STEVENSON & Co.

The guaranty given by defendant in ignorance of the above agreement, and of the parties executing it other than Mr. Stevenson, was sent to Quebec by T. A. McLean as the guaranty to be furnished under the above agreement, and no other guaranty was required, but the defendant was not aware that it was intended to be used for any purpose but to secure the amount of advances which should be made by M. Stevenson & Co. to T. A. McLean.

M. Stevenson, the plaintiff, conducts his business under the firm of M. Stevenson & Co., and the firm of Noad & Co. consists of Noad and Jeffrey, plaintiffs with M. Stevenson in this suit, but these firms have no connexion and are not partners in business. Advances were made to T. A. McLean to the amount of twelve thousand dollars, M. Stevenson & Co. accepting his draft drawn at Toronto through the Quebec Bank for that amount at six months, he paying the discount.

M. Stevenson & Co. received, in pursuance of the terms of the agreement, timber and staves of T. A. McLean at Quebec during the season of navigation in 1859, and sold the same, charging a commission on the sales, and the pro-

ceeds, after deducting such commission and charges, have been applied so far in payment of the advances made by plaintiffs, being credited as on a joint account. A balance remaining due, the plaintiffs have sued and have recovered judgment against T. A. McLean for the full amount which is still unpaid, and they now claim to recover from the defendant on his guaranty in their joint names the balance of such account; the season of navigation mentioned in the guaranty was closed before this action.

The defendant objected that he was only liable on his guaranty for any amount advanced by M. Stevenson, and actually received by T. A. McLean, and that he was entitled to have deducted from such amount the value of all timber and staves received by M. Stevenson at Quebec during the season of 1859.

The questions submitted for the consideration of the court were—

1st. Can the plaintiffs in their joint names recover on the guaranty of the defendant, or must not a suit thereon be in the name of M. Stevenson alone?

2nd. If the action must be in the name of M. Stevenson alone, can he recover the whole balance due by T. A. McLean on his agreement, or only the amount of his own advances?

3rd. If the latter amount only can be recovered, can the defendant claim credit for all the proceeds of lumber received at Quebec during the season of 1859 by M. Stevenson, or what portion thereof?

*Connor*, Q. C., counsel for plaintiffs.

*D. McMichael*, for defendant, referred to *Bonser v. Cox*, 13 L. J. N. S. Chy. 260.

DRAPER, C. J.—I am of opinion this joint action is not maintainable, and I think that opinion if correct decides all these questions, for if the guaranty was to Stevenson alone, it covers only advances made by him, and whatever timber and staves were delivered by T. A. McLean to

Stevenson, must, so far as this defendant is concerned, be applied in liquidation of Stevenson's advances.

The case of *Williams v. Lake*, 6 Jurist, N. S. 45, is a strong authority in the defendant's favour.

Judgment for defendant.

See *Chapman v. Plummer*, 1 N. R. 254, per *Mansfield*, C. J.

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### RUTTAN V. BOULTON ET AL.

#### *Arbitration—Revision of taxation—Costs of reference.*

It having been agreed by the parties on the trial that if certain facts left to the jury should be found for plaintiff, the matters of account were to be referred, no mention having been made as to costs; the jury found for plaintiff. On motion for revision of taxation by master (he having allowed the costs of the arbitration),  
*Held* that the costs of reference were costs of the cause.

This cause was in fact tried before a jury, but as the enquiry involved certain facts, and if they were found for plaintiff the amount to which he would be entitled was to be ascertained only by the investigation of long accounts, the opinion of the jury was only taken upon the plaintiff's right to recover, and the question of amount was referred, and it was agreed that the finding of the jury and the report of the arbitrator should come before the court on a special case, and that the court should direct what verdict should be entered.

At the trial the jury, besides finding certain facts, gave a verdict for the defendant, which was however subject to the above stated agreement. Afterwards a rule was made ordering the verdict entered for defendant to be set aside, and a verdict entered for plaintiff for £173, 11s. 5d., and that the *postea* be delivered to the plaintiff.

The master at Toronto, on appeal from the taxation of the deputy clerk of the Crown at Cobourg, has taxed the plaintiff his costs of the reference, allowing for the attendance of counsel before the arbitrator. It appears by the affidavits that the arbitrator sat upon seven different days—that all these days, except the last, when the plaintiff's evidence was

taken, were employed in taking the evidence of the defendants, and at their special request. That the average time of sitting each day was six hours, except on two of the days when adjournments took place at the instance of the defendants. Two counsel in fact attended, but the master allowed only one on taxation, and taxed him £5 for each day of full attendance.

The defendants obtained a rule from the Practice Court returnable here for a revision of taxation by striking out all the charges on the reference to the arbitrator, or to reduce the amount taxed to the counsel attending before the arbitrator.

There was no agreement whatever respecting the costs of the reference, nor did the arbitrator in his report give any direction whatever as to costs.

This rule was argued by *C. S. Patterson* for the plaintiff, citing *Macintosh v. Blyth*, 1 Bing. 267; *Tregoning v. Attenborough*, 7 Bing. 733; *Taylor v. Gordon*, 9 Bing. 570; *Brown v. Nelson*, 13 M. & W. 397.

*Cameron*, Q. C., for the defendants.

DRAPER, C. J.—I think it is quite clear these costs are costs in the cause. I have looked at all the cases referred to, beginning with *Macintosh v. Blyth*, 1 Bing. 267, and am confirmed in this conclusion. The cause itself was not referred, so that the award is the determination of the suit.

The reference was simply as to a statement of accounts—the facts were not left to the arbitrator on which the special case was framed. They were either found by the jury or admitted by the parties, and the court upon those facts and finding awarded the *postea* to the plaintiff. I see no proof whatever that anything but the accounts was before the arbitrator.

As to the amount allowed to the master as fees to counsel on the arbitration, I am not prepared to say he has exceeded the limits of a proper discretion. I am not disposed to interfere when he exercises his judgment within the limits which are prescribed to him unless on some very clear ground. If the number of days on which counsel attended

is complained of, it must be remembered that according to the affidavits by far the greater number of those days was occupied by the defendants themselves.

I think the rule should be discharged.

*Per cur.*—Rule discharged.

See *Tregoning v. Attenborough*, 7 Bingham, 733; *Taylor v. Lady Gordon*, 9 Bingham, 570; *Brown v. Nelson*, 13 M. & W. 397; *Reynolds v. Harris*, 3 C. B. N. S. 267. *Murray v. Sunderland Dock Co.*, 1 F. & F. 179, is a reference of the same nature as in the present case.

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### HAMMILL V. DEWOLF.

*Interpleader—Purchase by plaintiff under prior execution—Proof of judgment under which issued.*

Interpleader issue to try right to goods in possession of, and bought by plaintiff at sheriff's sale under *fi. fa.* against execution debtors, as against defendant, the execution creditor.

*Held* that plaintiff was not bound to prove a judgment to support the prior execution under which she bought the goods.

INTERPLEADER to try whether certain goods seized by the sheriff of Wentworth under a *fi. fa.* tested the 26th of March 1860, and delivered to the sheriff on that day, for having execution of a judgment recovered by W. A. DeWolf, the defendant, against Jacob Hammill, Junr., were at the time of the delivery of the writ the property of Frederica Hammill, the defendant.

The plaintiff proved that under a *fi. fa.* from the Queen's Bench at the suit of Paul T. Ware against Jacob Hammill and David Hammill, the goods in question had been seized in two stores on King and John streets, in the city of Hamilton, and remained on hand for want of buyers. That a *ven. ex.* tested the 12th of August 1859 (which was produced) was delivered to the sheriff, and on the next day the sheriff sold, and the plaintiff Frederica Hammill purchased and obtained from the sheriff a bill of sale (also produced) of the goods. The same bailiff who seized and sold these goods was directed by DeWolf to seize the same goods under the execution mentioned in the interpleader issue. And the

bailiff did seize them in the possession of the now plaintiff in a store over which her name was, and not where he had previously seized and sold them. On cross-examination the bailiff, who had proved the foregoing facts, stated that the first sale appeared to him an honest *bona fide* transaction, but that he considered it was done to secure Ware's debt in preference to the others. The now plaintiff gave Ware a note for the amount at which she bought the goods at the sheriff's sale, and she afterwards paid it.

This was the plaintiff's case, and for the defence it was objected that the plaintiff was not entitled to recover, as she had not proved a judgment on which the writ in Ware's suit issued. This objection was overruled.

On the defence it was proved that Jacob and David Hammill were indebted to DeWolf for tobacco, and that Jacob had signed a note or notes for the price, and that an application was made to them for the payment. They promised to pay, and said they could pay in two or three months. This was in May 1859. Their mother, the now plaintiff, was present; they spoke together in their own language (German). In August following Jacob Hammill said he would not pay, and the witness (who was acting as agent for DeWolf) told him he could be made, and he replied he could put his property out of his hands. The plaintiff, Jacob's mother, was present, but the witness did not know if she heard this reply; he thought she might if she understood English.

Then Jacob Hammill was sworn, and said he bought the tobacco from DeWolf. He denied getting Ware to sue him and obtain judgment in order to deprive DeWolf of his debt. He stated that part of the debt which he and his brother owed Ware had been due four months, and part six months; that he defended DeWolf's suit, and did not defend Ware's; that Ware sued them the first; that they owed both debts; he defended DeWolf's suit because he sold them rotten tobacco; that Ware's suit was brought without his (Hammill's) procurement; that the sale by the sheriff was *bona fide*; that plaintiff removed the goods to her own store after her purchase, and she paid the note given for them to Ware out of her own money.

The jury found for the plaintiff, and the defendant obtained a rule *nisi* for a new trial, because no judgment to support Ware's execution was proved, and for misdirection in holding that the purchase, under a *fi. fa.*, without proof of a judgment to warrant it, conveyed a title as against the defendant DeWolf, who was a stranger to that judgment, if any such there was.

After argument the judge of the county court discharged the rule with costs, and the defendant appealed against the decision.

*O'Reilly* in support of appeal.

*Burton* contra.

DRAPER, C. J.—If the goods in question had been seized by the sheriff under DeWolf's execution in the hands of Jacob and David Hammill, or either of them, and the plaintiff complained of that seizure as a trespass, there would be reason for contending that she must establish her absolute ownership, inasmuch as she was out of possession, for she must shew title in order to prove the seizure to be a trespass to her property. But she may, as this case stands, for the sake of the argument, concede that the proof of an execution against those goods as the goods of her sons, and the sale under the execution, and even payment by her for them, if she allowed the execution debtors to remain in possession of them, would be insufficient to entitle her to recover without also proving the judgment, for that concession would not decide the case.

She has proved, however, that she was in actual possession as owner at the time of the seizure and sale under DeWolf's execution. If she had sued DeWolf for that seizure, he must have proved his judgment in order to warrant his execution, but in the present case, no fraud having been shewn, she is as much entitled to be considered a stranger to Ware's judgment as DeWolf is. The goods having been taken out of her hands, it would not be enough merely to shew that DeWolf had recovered judgment and issued execution against Jacob and David Hammill; he

must also shew that the goods seized were theirs. But the plaintiff did not rest only on proof of possession; she went further, and proved that she bought these goods as the goods of her sons on the 13th of August 1859 at the sale under Ware's execution; that she paid for them, and took them into her possession eight months before DeWolf's execution came into the sheriff's hands, long before DeWolf could have obtained judgment, and that until the last seizure she remained in possession of them.

She cannot, in my opinion, be placed in a worse position than if on the 13th of August 1859 she had bought these goods of her sons and paid for them, and had them ever since, or even if the goods, admitted to have been her son's property in August 1859, had been transferred to her and had remained in her actual possession as apparent owner ever since. To deprive her of the apparent right of property the sheriff must have shewn that the right to the goods was in her sons notwithstanding her possession, and the same consequence, I apprehend, must follow here. I think, therefore, the objection taken at the trial was rightly overruled.

The defence does not shake the plaintiff's case. So far as DeWolf's right as a judgment and execution creditor against any goods of Jacob and David Hammill is concerned, it is not questioned. But that is not enough unless these goods were their property. It is true the goods were confessedly theirs at one time, but the possession of them has been changed long ago, and the plaintiff shews that when she got possession she paid value. The defendants proved nothing to shew that this change of possession was colourable; on the contrary, there was evidence to sustain it as a *bona fide* sale. So it all turns on the necessity of her shewing a judgment to fortify her possession, which alone would entitle her to maintain trespass against anyone who took these goods from her on an execution against her sons, who failed to prove, first, that they had a right to take the son's goods, and secondly, that the goods taken belonged to the sons.

I think the appeal should be dismissed with costs.

Appeal dismissed.

## MILLER V. TUNIS.

*Surety—Liability of—Con. Stat. U. C., ch. 19, sec. 25.*

*Held* that the surety of a Division Court Bailiff under Con. Stat. U. C., ch. 19, sec. 25, is not relieved from liability under his covenant by reason of his principal neglecting to execute the instrument containing the same.

The declaration stated that defendant, by deed dated 1st June 1857, covenanted in the sum of £100 that George W. Wright, bailiff of the second division court of the county of Wentworth, should duly pay over such money as he should receive by virtue of his office of bailiff to the person entitled to receive the same, and faithfully perform the duties of the said office, &c.; that while Wright continued to be such bailiff the plaintiff recovered in the second division court of the county of Wentworth a judgment for £25 debt and £2 costs against one William Knowles, and the clerk of the said division court issued a writ of execution against the goods of the said Knowles, directed to the said Wright, which was delivered to him to be executed (setting it out); that Wright by virtue of that writ levied of the goods of Knowles the sum of £27, but has not paid over the same according to the exigency of the writ, and so plaintiff says defendant hath not kept his covenant.

*Plea.*—That the covenant was made after the passing of “the division court act,” and was intended to be entered into by defendant as one of the sureties of Wright, and that he signed the same on the express understanding that Wright should execute the same, but Wright has never executed it, nor has the judge of the county court approved thereof.

*Demurrer.*—Because the covenant appears to be general, and is not affected by the non-execution by Wright, and that the provisions of the statute as to the judge’s approval are merely directory.

*Harrison* for the demurrer.

*Burton* contra.

DRAPER, C. J.—Every bailiff of a division court shall, by a covenant according to a form given, give security with so many sureties, being freeholders and residents in the county, and in such sums as the county judge may direct, and shall

under his hand approve and declare sufficient. Consolidated Statute, U. C., ch. 19, sec. 25.

Sec. 26.—Before the bailiff enters on the execution of his duties, his covenant, and that of his sureties, approved as aforesaid, shall be filed in the office of the clerk of the peace. The form of covenant is given by schedule A. That declared upon is substantially the same. It is contemplated by the form that the bailiff and his sureties shall join in the same covenant.

There is no covenantee named in the covenants given in pursuance of the act. The statute, after prescribing that a covenant shall be given by the bailiff with as many sureties as the judge should require, and declaring that such covenant should be filed before the bailiff enters on the discharge of his duties, enacts that “such covenant shall be available to, and may be sued upon in, any court of competent jurisdiction by any person suffering damages by the default, breach of duty, or misconduct” of the bailiff.

The defendant is sued as a surety on a covenant which the statute directs shall be entered into by his principal. It is not averred that the judge had directed there should be more than one surety, and on these pleadings we may infer he only required one. The question then seems to be, whether the defendant's position as surety in a limited sum, and being jointly and severally liable according to the form given by the act, is prejudiced in any way by the non-execution by the principal. If the latter had executed the covenant the surety might have been sued alone, and in the event of a recovery against him he would have the same and no other recourse against his principal than he will have if this case is decided against him, namely, by action for money paid. The plea does not set up that the covenant was executed only as an escrow until the principal should execute, on which an issue in fact might have been raised, but it admits its execution as a deed, and seeks to render that execution a nullity because the principal has omitted also to enter into the covenant.

I have no doubt but that as regards the public, and for their protection, the legislature meant that the bailiff, as

well as his sureties, should enter into the covenant specified in the act, though in effect it only alters the remedy which any suitor for whom money had been collected by the bailiff would have to recover the same against him. And to enforce this security being given it was expressly provided that the bailiff is to give it, and the judge to approve of the sureties as well as to settle the amount—a duty apparently neglected in this case.

Still, I cannot conceive that if in the present case the bailiff were sued by the creditor whose money he had collected, he would be heard to set up that the legislature had directed that he should give a covenant under seal as a security, and that having omitted to do so he could not be sued on an implied contract to pay over what he had received. But if so, the clause respecting the bailiff would only be a directory clause, and his acts would be valid, and his liability arising from them complete, both to discharge the debtor from whom he collected moneys, and to charge himself to the party whose money he thus received.

I see no greater difficulty in treating the act as merely directory in this case also. We may assume that the judge required only one surety, for the statute does not specify any number, and the defendant executed the covenant accordingly. It may, as between himself and his principal, have been understood as the plea sets forth, but the breach of that understanding cannot, I think, be an answer to the party for whose benefit the security was designed, and who for the first time becomes a *quasi* party to it when he has occasion to resort to it for indemnity against the default of the bailiff, the intended principal.

I think there should be judgment for the plaintiff.

*Per cur.*—Judgment for plaintiff.

## GRAHAM V. BAKER.

*Covenant—Breach—Eviction—Damages.*

An allegation in a declaration that the defendant (who sold and conveyed a certain lot to plaintiff) covenanted that at the time of the ensealing and delivery of the deed he was and stood rightfully seized in fee simple of the land, and had good right to convey and dispose thereof, setting out a breach without averring an eviction,  
*Held* insufficient to entitle plaintiff to substantial damages.

DECLARATION set out a deed made by defendant on the 15th July 1848, whereby defendant, in consideration of the sum therein mentioned, did grant, bargain, sell, &c., unto plaintiff, his heirs and assigns, the east half of lot No. 14 in the second concession of Roxboro'. Habendum to plaintiff, his heirs and assigns for ever. Plaintiff averred defendant thereby covenanted with him that he, defendant, at the time of the ensealing and delivery of the deed, was and stood solely and rightfully seized in fee simple of the land, and also covenanted with plaintiff that at the time of making the deed he had good right to convey and dispose of the said lands and tenements to the plaintiff in manner and form aforesaid, and for a breach of the covenant plaintiff said that defendant at the time of sealing the deed was not and did not stand rightfully or lawfully seized of an estate in fee simple of the land in the deed mentioned, and for assigning a second breach said that the defendant at the time of the sealing of the said deed had not in himself good right to convey and dispose of the said land unto the plaintiff in manner and form aforesaid. Damages £200.

Judgment by *nil dicit*.

The case was taken down for assessment of damage before the Chief Justice of this court at the last spring assizes for the united counties of Stormont, Dundas, and Glengarry.

The plaintiff put in the deed shewing the consideration to be £31, 5s., which with the interest to the fourth day of last term amounted to £54, 3s., and claimed to be entitled to this sum. As there was no eviction charged in the declaration, and none proved, the learned Chief Justice inclined to the opinion that plaintiff was only entitled to nominal

damages. Damages were accordingly assessed for the plaintiff at 1s., with leave to plaintiff to move to increase the damages to the amount claimed by him.

In Easter Term last *J. S. Macdonald*, Q. C., obtained a rule accordingly, returnable in Trinity Term. During the term he moved the rule absolute, and referred to *Plumer v. Simonton*, 16 U. C. Q. B. 222; *Vallier v. Walsh*, 6 U. C. C. P. 459; *McKinnon v. Burrows*, 3 O. S. U. C. 591; *Grant v. M'Lean*, 5 O. S. U. C. 460; *Bickford v. Page*, 2 Mass 455; *Mayne on Damages*, 96; and *Carlyle v. Ord.*, 7 U. C. C. P. 456. No cause was shewn against the rule.

RICHARDS, J.—I am not aware of any recent decision in England as to the amount of damages recoverable in an action of this kind. There are many decisions in the American courts, but they are not uniform, and cannot therefore be relied upon. When there has been an eviction, or the plaintiff has never got into possession of the land, and in consequence of the want of title never can, the purchase money and the interest, where there is no fraud, is the measure of damages under the covenants set out in this declaration.

“But it may be doubted whether the same rule would hold good as a matter of law where the plaintiff had got into possession, and in fact continued so still.” *Mayne*, pages 96-7.

In the United States it has been held that the covenant for seisin and a right to convey (being broken as soon as made when the defendant is not seized and has no right to convey) is not a continuing covenant, and does not pass with the transfer of the covenantee's right to a third person. *Rawle*, 334.

It is considered by those courts that they are covenants *in presenti*, and broken as soon as made, and therefore do not pass to the assignee. The English cases consider them not so much covenants *in presenti*, but as covenants of indemnity, and though nominally broken at the moment they were entered into, in reality have a continuing breach not consummated until some actual damage has taken place.

If the rule laid down in some of the American courts be the correct one, that we are to assume that as nothing passes by the deed for want of authority in the grantor to convey, therefore the covenant is not a continuing one, then it would seem that the plaintiff ought to recover the amount of the consideration money and the interest, for nothing passed to him by the deed. It is true he may have got into possession, but he is in fact an intruder on the rights of others, and may be ejected and subjected to an action for mesne profits for the very period which he has kept possession. If the covenant be considered as one of indemnity and a continuing covenant, as the English authorities would seem to hold, then, of course, all the plaintiff would be entitled to recover would be such damages as he shews he has sustained from the breach of the covenants. The case of *Gray v. Briscoe*, Noy 142, seems to sustain this view where something passes by the deed. "B. covenants that he was seised of Blackacre in fee simple, where in truth it was copyhold land in fee according to custom. By the court the covenant is broken (in the original a misprint *not* broken), and the jury shall give damages in their consciences according to that rate that the country values fee simple land more than copyhold land." If the possession of the land accompanies the deed, and the plaintiff has obtained actual seisin, and may never be disturbed in his possession, it cannot be said that he loses the whole estate, or that he has not obtained something through the conveyance. It is true his estate may be less valuable than what he contracted for, but by the lapse of time it may become a perfect title. He may recover for the diminished value of the estate for want of the perfect title, but until he is evicted his damages are not necessarily the purchase money and the interest, the more so if he may bring another action on being evicted. The argument in favour of the view that the plaintiff is not necessarily entitled to recover the full amount of the purchase money and interest when he has entered into possession and has not been evicted is well put in a few paragraphs from *Mayne on Damages* at p. 97, which I will extract.

"A case may be easily imagined, and indeed constantly

occurs, in which there is such a defect in the title as makes it strictly unsaleable, though there is little or no chance of the occupant ever being turned out. In such a case it would not be fair to allow the whole purchase money to be recovered. The vendor has not given a saleable title as he engaged, but he has given up his own possessory title, which was worth something to him, and is worth something to the purchaser. It is clear that if he were forced to refund the entire purchase money the estate would not revert to him, because as against him the title would still be in the vendee. The covenant, it will be observed, is a continuing one (*Kingdon v. Nottle*, 4 M. & S. 53), and therefore may be sued upon from time to time according as fresh damage arises. The fair rule then would be to give the plaintiff such damages as will compensate him for the defective quality of his title. This was the course adopted in *Kingdon v. Nottle*, where the special damage laid was, that the lands were thereby of less value to the owner, and that he was hindered from selling them so advantageously. And so in an American case (*Spring v. Chase*, 22 Main, 505), where it appeared that there was an outstanding paramount title which the plaintiff had purchased in, having been all the time in possession, it was held that he was not entitled to recover the whole consideration money with interest, but only the amount paid to perfect the title with interest from the time of payment. \* \* \* When the plaintiff has always been in possession, and his title has since been perfected without any expense on his part, nominal damages only can be recovered in the absence of special loss, as, for instance, where the grantor having conveyed without title, subsequently acquired a title which was held to enure to the grantee by estoppel." *Baxter v. Bradbury*, 20 Maine, 260.

Mr. Rawle, in his work on covenants, at p. 101, seems inclined to doubt if a plaintiff could bring a second action, after having recovered nominal damages, for a breach of these covenants. He says, after referring to a case where the lapse of time perfected the plaintiff's title, and he was held entitled only to nominal damages—"Where, however, the lapse of time has not been such as to have cured the

defect of title if only nominal damages were allowed, it would be at least questionable whether another action could be sustained on the same covenant on a subsequent occasion when the actual damage happened. He refers to a case in Maine—Donnell v. Thompson, 1 Fairfield, 174.

In Rawle, at p. 100, it is stated thus—"If the vendee himself has extinguished the paramount title by purchase, his damages are of course limited to the amount reasonably paid for that purpose, provided it do not exceed the consideration money, and in a very recent case it has been held that the burden of shewing the amount to be reasonable rests upon the plaintiff in the first instance—the mere fact of the payment being no evidence of this.

"In a case where the failure of title has been such as to cause a technical breach of the covenant for seisin, yet not such as to have visited upon the purchaser any loss of the land, it would be obviously inequitable that he should be entitled to have the damages measured by the consideration money, and while receiving them still retain the land for the loss of which they were intended as an equivalent."

If the proposition that these covenants are continuing ones, and may be sued on *toties quoties* whenever the plaintiff sustains further damages, as Mr. Mayne lays it down, this would be conclusive on the question of the plaintiff here being only entitled to nominal damages. At present I am not prepared to decide the case on that ground, but even admitting that the recovery in this action would be a bar to any future action for a breach of these covenants, I am still of opinion, under the facts of this case, we are not warranted in increasing the damages as sought by the plaintiff in this rule.

Under the naked statement that defendant was not at the time he conveyed the land to the plaintiff seised in fee, and had not a good right so to convey, when the plaintiff may have been in the full enjoyment of the land, and may so continue sufficiently long to perfect his title, I do not think the plaintiff makes out a case for substantial damages. He does not aver, as in Kingdon v. Nottle, that by reason thereof the premises are of less value, and that he has not been

able to sell the same for so large a price as he otherwise would have done, nor does he shew by evidence that the facts are such that his title cannot be perfected in a reasonable time, and that what he has received from plaintiff is really of no value to him.

If he thinks he can by bringing the case before another jury shew facts to entitle him to substantial damages, he can have his rule so framed as to enable him to do so. Or if he thinks it advisable after getting such rule to put an end to the action rather than embarrass himself with a verdict for mere nominal damages, I take it for granted he will discontinue.

On the whole, I think we cannot make plaintiff's rule absolute as he desires. If he elects before the first day of next term to mould the rule so as to take the case down before another jury, the rule to go to that effect, otherwise the rule will be discharged.

*Per cur.*—Rule discharged subject to election of plaintiff.

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The following gentlemen were called to the bar during this term:—ALEXANDER MAIRS, THEODORE HENDERSON SPENCER, JOHN LIVINGSTON, DAVID BLAIN, THOMAS HENRY BULL, JAMES ALEXANDER McCULLOCH.

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MICHAELMAS TERM, 24 VICTORIA.

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Present :

The Hon. WILLIAM HENRY DRAPER, C. B., C. J.

„ „ WILLIAM BUELL RICHARDS, J.

„ „ JOHN HAWKINS HAGARTY, J.

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DOBBIE V. TULLY.

*Sale for taxes—Distress on premises—Limitation of time—Statute 13 & 14 Vic.  
ch. 67, sec. 67.*

*Held* that the period allowed for distress for taxes on premises, under 6 Geo. IV. ch. 7, is not limited to a month after the receipt of the warrant by the sheriff ; and where there was proved to have been ample distress on the premises between the receipt of the warrant and the day of sale, the sale was held to be invalid.

*Held* also that this case, upon the facts as stated underneath, did not come within the 57th sec. of 13 & 14 Vic. ch. 67.

EJECTMENT for lot No. 7, 6th concession of North Burgess, containing 200 acres.

Defence for the whole. Writ issued the 24th of February 1860. The claimant's notice of title was under a deed from the sheriff of the united counties of Leeds and Grenville to one D. B. O. Ford, under a sale to pay assessments on a writ directed to him according to law, and by deed from Ford to himself. The defendant's notice of title was by patent from the Crown to George Balter. Deed from George Balter to John McCall. Deed from John McCall to Wm. McLelland, and deed from McLelland to defendant, and by length of possession in defendant.

The trial took place at Perth in October last before Sir J. B. Robinson, C. J. The plaintiff gave sufficient evidence as regarded the liability of this land for taxes, and on every other point, to entitle him to recover, unless some part of his case was met and displaced by evidence for the defence. There were two exceptions raised at the close of the case:—1st, that the want of distress was not sufficiently

proved, and 2nd, that the deed from the sheriff was not executed in compliance with the statute 13 & 14 Vic., ch. 67, sec. 57. The learned Chief-Justice overruled the second objection, and as to the first held that there was evidence to go to the jury. The defendant then went into evidence to shew that there were growing crops—wheat, corn, and potatoes—on the lot during the summer of 1850 (the warrant to levy having been placed in the sheriff's hands after the 17th of May 1850); that the wheat was stacked upon the land, and remained there during the following winter; that in January 1851 the defendant and his family went to live on the lot, and had there a yoke of oxen, a cow, potatoes, and household furniture, from that time until at and after the sale for taxes in April 1851. The evidence as to whether there was or was not distress upon the premises during the currency of the writ was very conflicting, and it was left to the jury to decide whether there was distress upon the lot, from the end of January to April 1851 more particularly, in which case they were told to find for the defendant.

They gave their verdict for the defendant, and in the following term

*Richards*, Q. C., obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection, contending that unless there was distress on the premises within one month after the receipt of the writ by the sheriff, the lands became absolutely fixed for sale by the effect of the 7th, 8th, 10th and 11th sections of the statute 6 Geo. IV., ch. 7, and that it made no difference whether there was or was not any distress afterwards. And that assuming the truth of the statements of the defendant's witnesses, they only proved that there were growing crops on the premises at the time the sheriff received the warrant to levy in May 1850, and from thenceforward until harvest, and growing crops he contended were not distrainable under this warrant.

*Deacon* shewed cause.

DRAPER, C. J.—We agree entirely with the learned

Chief Justice that this sale is not affected by the provisions of the statute 13 & 14 Vic., ch. 67; and looking at the statute 6 Geo. IV., and considering *Mr. Richards'* argument, we are of opinion that the time during which the proviso requiring the sheriff (in case there is distress upon the lands from whence the amount directed to be levied could be made) to levy the same by sale of such distress applies, is not limited to one month after the writ comes to the sheriff's hands. We do not mean to decide that it was the sheriff's duty to ascertain whether there was a sufficient distress on, or immediately preceding, the *day* of the sale, nor to fix any particular number of days which the sheriff may allow to elapse, after searching for distress and finding none, without making a new search in order to authorise a sale of the lands. But we feel no doubt, that if for a period between two or three months before a sale of the land there was to be found thereon on any and every day an abundant distress to satisfy the amount which is to be levied, and the sheriff, notwithstanding, proceeds to sell and convey the land, such sale will pass no right or title to the purchaser.

In the present case there is as ample evidence to sustain the finding for the defendant as there was to have justified a contrary verdict. It depended on the credit the jury gave to the witnesses on one side or the other. No doubt the testimony of local officers, particularly of the assessors and collectors, with the aid of their rolls, would have made it clearer one way or the other as to when the defendant went with his family to live on this lot, taking his oxen and cow with him. If on enquiry the plaintiff finds he can in this or in any other way make a stronger case, he has it in his power to bring another action. But there is before us no suggestion that the plaintiff could make a stronger case if a new trial were granted to him. And we could only grant a new trial on payment of costs of the last trial and of this rule, which form by much the largest portion of the costs now incurred in the cause.

We are of opinion, therefore, this rule must be discharged.

*Per cur.*—Rule discharged.

ANNE KEANE, ADMINISTRATRIX OF THOMAS WEIR AND  
JOHN KEANE V. BENJAMIN STEDMAN.

*Trover—Interpleader—Division court decision—Appeal from.*

Action of trover by A. K., as administratrix, and J. K. against S. for goods seized by S. under a division court execution, A. K. claiming as administratrix of Thomas Weir. An interpleader issue was tried by the judge of the division court, who decided that the goods did not belong to A. K. as administratrix, &c. On motion for new trial, *Held* that the decision of the judge of the division court is final under Con. Stat. U. C., ch. 19, 175.

TROVER for a yoke of oxen and two cows.

*Pleas*—1. Not guilty.

2. That the property was taken on a division court execution at the suit of defendant against plaintiff John Keane; that a claim was made by plaintiff Anne Keane as such administratrix; that a summons was issued by the clerk of the division court, calling upon plaintiff and defendant to attend, and upon the return of that summons the judge of the division court adjudicated upon the claim that the property belonged to John Keane, and not to Anne Keane, his wife, as administratrix, and therefore said property was taken and sold upon the execution.

*Replication*—That after the goods were taken in execution, and after the adjudication upon the summons in the plea alleged, and before the sale of the goods, and before the *final adjudication* by the said judge, the plaintiff obtained from the said judge a new trial and rehearing, and a further adjudication by him on the plaintiff's claim, of which defendant had notice, and the judge ordered a new trial and rehearing, of which the clerk of the division court notified the plaintiffs and defendant in writing, which rehearing having been duly allowed, was a supersedeas to the execution, and that plaintiffs gave defendant notice thereof, and required defendant not to proceed, yet defendant, before any further rehearing and final adjudication by the said judge, committed the said grievances.

Issue on both pleas and on the replication.

The case was tried at Belleville in September 1859 before *Hagarty, J.* It was proved that the cattle in question had belonged to Thomas Weir, the former husband of the plain-

tiff Anne, at the time of his death, which took place in the spring of 1858, and remained with the widow till she married the plaintiff Keane, and after this marriage were seized and sold under the execution stated in the second plea; that Thomas Weir left seven children. The sale was forbidden, and Anne Keane claimed the property as administratrix of Thomas Weir. On the defence it was proved that in April 1859 an interpleader summons issued as stated in the plea; that the judge heard evidence, Anne Keane being examined; that the judge wrote a minute in the division court interpleader summons book—"The property adjudged to be John Keane's, not claimant's—John Keane to pay costs in ten days." Afterwards a new trial was applied for, and the judge refused a new trial in open court. The clerk said that the judge had told him he had granted a new trial. The bailiff who had the execution obtained the interpleader summons; it was addressed to "Mrs Keane, executrix." She gave a notice of claim to the bailiff, signed "Anne Keane, her mark." She attended before the judge; the letters of administration were produced. She was examined, and said that she claimed as administratrix. A doubt was suggested if any evidence on oath was taken.

For the plaintiffs it was objected that her claim was not signed in her representative capacity; that the interpleader summons was addressed to her as executrix, not saying of whom; that the written memoranda of the judge was not an order *inter partes* as contemplated by the statute; that there was no adjudication, because no evidence was received; that the adjudication was open to impeachment if wrong in law; that the judge in fact did order a new trial.

The learned judge overruled all the objections and nonsuited the plaintiff, with leave to move to set it aside.

In Michaelmas Term *Henderson* obtained a rule *nisi* on the leave reserved.

In Hilary Term 1860 *D. B. Read* shewed cause, and referred to Consol. Stat. U. C. ch. 19, sec. 36, p. 141.

During this term the case was mentioned at the bar as standing for the judgment of the court.

DRAPER, C. J.—It seems clearly proved that the administratrix of Thomas Weir, who with her husband has brought this suit, was before the judge of the division court on the interpleader summons. That fact, in my opinion, puts an end to all objections as to the form of the claim or of the manner in which the interpleader summons was addressed. The proper parties were before the proper tribunal, and sec. 191 of the division courts act (Consol. Stat., U. C., ch. 19) enacts that no judgment shall be vacated for want of form. There the judge in fact adjudicated against her and made a memorandum of his decision. The objection to this is again a matter of form, as to the want of evidence to support the decision. The administratrix made a claim and had to support it, and if she failed to adduce evidence to support it, what could be done but to dismiss it. The want of evidence only shews that she could not or did not sustain her claim. And as the 191st section of the statute above cited makes the decision of the judge final and conclusive, we are not justified in reviewing it if he had jurisdiction to decide it, which is not denied.

I think, therefore, the rule should be discharged.

*Per cur.*—Rule discharged.

# INSTITUTE OF LADIES OF THE SACRED HEART v. MATTHEWS ET AL., EXECUTORS OF JOHN B. CROUSE.

*Executors—Contract by testator—How far binding on.*

Upon an action brought against the executors of a testator for the board and education of his (the testator's) daughter, a verbal contract, at the most for three years, was proved with the testator, and knowledge of his death being shewn by the plaintiffs themselves, by charges made in their account,

*Held* that the contract not being a binding one upon the testator if alive, this action cannot be maintained thereon against the executors after his death.

DECLARATION for money payable by testator to plaintiffs for work by plaintiffs as school teachers, in teaching Mary Crouse, the infant daughter of testator, and for meat, drink, lodging, &c., clothing and other necessities, provided for

the said infant at the testator's request, for money paid in providing necessaries for the infant at the testator's request, and other common counts against testator himself. 2nd count, for money payable by defendants as executors on the same accounts at the request of testator. 3rd count, for money payable by defendants as executors on the like accounts, at the request of the defendants as executors.

*Pleas*—1. That plaintiffs are not a corporate body entitled to sue in a corporate name or capacity. 2nd. That testator was never indebted. 3rd. Payment by testator in his lifetime. These two pleas to the first count only. 4th. to the 2nd and 3rd counts—defendants never indebted. 5th, to 2nd and 3rd counts—payment by defendant. 6th, to 1st and 2nd counts—a special plea of *plene administravit*.

*Replication* joining issue on all the pleas, and to the 6th that testator died seised of lands in fee, and of divers equities of redemption chargeable with his debts.

Rejoinder takes issue on the replication.

The trial took place at Simcoe in October last before *Hagarty, J.* The plaintiffs put in a copy of "An Act to Incorporate the Female Seminary of Eden Hall, in the County of Philadelphia," purporting to be passed by the senate and house of representatives of the commonwealth of Pennsylvania in general assembly met, by which act certain persons therein named, and such others as were associated with them, were created a body corporate and politic under the name of "The Institute of Ladies of the Sacred Heart," and the members of said institute who from time to time should be associated together according to its rules and constitution, were created a body corporate and politic, having succession for ever under said name. This act purported to be passed on the 12th of February 1849. The copy produced was certified to be correct by the deputy-secretary of the commonwealth of Pennsylvania, under the seal of the secretary's office, and there was a certificate signed by the governor of the state, under the great seal of Pennsylvania, that the party signing the first certificate was deputy-

secretary of Pennsylvania, and that full faith and credit ought to be given to his official acts, and lastly, a certificate of the British consul for the state of Pennsylvania, under the seal of the consulate, that the person signing the certificate last above set forth was governor of the state of Pennsylvania.

The plaintiffs then put in two commissions issued from this court for the taking evidence in this cause. They were opened and handed to defendants' counsel, and the learned judge asked if any objection existed, as it should be made before the evidence was read. The evidence was then read, the defendants' counsel reading the questions and the plaintiffs' counsel the answers.

The evidence taken on these commissions stated that the plaintiffs were a female seminary incorporated by the legislature of the state of Pennsylvania by the name of the Institute of Ladies of the Sacred Heart. That Mary Crouse was in November 1855 brought to Eden Hall, the name of the place where the institute is conducted, near Philadelphia, in the state of Pennsylvania. She was brought by her father to become a pupil in the school. Her father, John B. Crouse, said that he wished his daughter to remain there at school and finish her education. To the best of the recollection of one witness (the superior of the school and the president of the corporation) he said he desired her to remain three years. The terms agreed on were that Dr. Crouse should pay for board and tuition \$180 per annum; entrance fee \$5; for use of library \$2 a-year; washing \$20 a-year; stationery \$10 a-year, and a great variety of other items. The institute were also to supply her with clothing and pocket money. The bills for board and tuition were to be paid every six months in advance. Mary Crouse continued to reside at the institute from the 17th of November 1855 to about the month of October or November 1858. An account was put in and proved for board, tuition, clothing, &c., &c., amounting to \$1,633, beginning the 17th November 1855 and ending September the 25th 1858.

After the evidence taken on the commissions had been

read, the defendants' counsel objected that there was no affidavit of their having been duly taken. The learned judge overruled the objection, considering that by what had happened the defendants' counsel had waived it.

The plaintiffs also called one of the defendants, who admitted that testator died seised of real estate other than that referred to in the plea, and leaving also personal property. He stated that the testator died 6th of March 1856; that the executors did not know where Mary Crouse was until April 1859, till which time they had no communications with plaintiffs. That Henry Crouse, after testator's death, applied to defendants for moneys for his sister Mary, and this witness advanced £50 out of his own pocket. The witness knew she was at school somewhere out of the province. The family concealed from him where she was. Henry Crouse urged on the defendants that Mary was in great want of money and was sick, and must have money in some way. This witness swore he never sanctioned her being at school on defendants' account as executors, or made payments for her schooling, though he had heard that testator had put her to school in the United States. He understood the \$200 he advanced was to pay the doctor's bill and to bring her home. He knew she was entitled to some money under her father's will, and advanced this to help her, on account of her legacy. It was admitted testator paid in his lifetime \$230.

The defendants' counsel took numerous exceptions to the plaintiffs' case.

It was agreed that the balance claimed was \$1203, and that the case should be left to the court on the facts (drawing inferences as a jury might) as to whether defendants were liable on the promises of testator for any and for what sum, and whether any implication of law made them liable on promises as executors—the verdict to stand for the whole amount, or for any and such sum as the court might order. Judgment to be taken against lands in the usual form. Issue as to plaintiffs being a foreign corporation being in like manner settled by the court. Defendants to move the court to settle issues, on which any verdict to stand.

It was conceded there was no conflict as to facts; that the testator did put his daughter to school, and that all that was due in his lifetime he fully paid. The difficulty was as to the extent of the executors' liability after his death, whether for one year, or what time, or for all the three years.

In Michaelmas Term *M. C. Cameron* moved for a rule to enter a nonsuit or verdict for defendants pursuant to leave reserved, or to reduce the verdict, or for a new trial on the law and evidence and for the improper reception of the evidence taken on the commission.

*Mattheson* shewed cause, citing *Souch v. Strawbridge*, 2 C. B. 808.

*M. C. Cameron*, in reply, cited *Blades v. Free*, 9 B. & C. 167; *Campanari v. Woodburn*, 15 C. B. 400.

DRAPER, C. J.—We are placed in the situation of a jury to draw inferences of fact from the evidence, and though on some points there was no conflict between the parties at *nisi prius*, one very important fact must be determined *in limine*, and that is, what was the precise contract made by the testator? Upon this point the superior of the corporation bringing this action says—"Dr. Crouse stated to me that he wished his said daughter to remain there at school and finish her education. According to the best of my recollection, he said he desired her to remain three years and to be taught whatever we might think best. We were also to supply her with clothing. The Dr. directed me to give her pocket money according to the best of my recollection. The bills were to be paid every six months for board and tuition in advance."

I find no other evidence bearing on this question, and the strongest inference of fact that anyone could draw from it is, that this was a verbal agreement on the part of the testator for the board and tuition of his daughter by the plaintiffs for the period of three years. And this was, I think, evidently the opinion of the plaintiffs. For they were apprised of the death of Dr. Crouse by the 25th of

April 1856 at all events, probably earlier, as he died on the 6th of March in that year; but on the 25th of April there is a charge for furnishing the daughter with mourning. Unless they thought they had a subsisting contract, they would have referred to the family or to the executors to know who for the future was to pay them—particularly as Dr. Crouse had, on the 17th of November 1855, paid for six months; and on the 25th of April is a charge (in advance, I presume) till July, though said to be from February, which is an obvious mistake, as the sum shews the charge is for three months' board and tuition.

If this conclusion of fact be correct there was no binding contract on the testator—he might have removed his daughter at any moment. And admitting that if he had allowed her to remain he might have been liable to the plaintiffs, it would be on an implied promise, not upon the contract for three years. But the defendants as his executors are not liable on any express or implied promise of their own, and if he was not liable on the contract for three years during his life they cannot be held so after his death. The payments made by him covered all the liability accruing during his life. I think the defendants are entitled to a nonsuit.

Judgment for defendants.

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## LUND V. SMITH.

*Replevin—Reference of all matters in dispute to arbitration—  
Uncertainty in award.*

Upon a general reference to arbitrators of all matters in dispute between two parties,

*Held*—1. That it is not necessary that the award should distinguish between the matters in dispute in the cause upon which the reference is made, and general matters between the parties referring.

2. That by directing the delivery of a certain promissory note (which was not in dispute in this action, but was sued upon in the Queen's Bench), and upon such delivery ordering releases between the parties, and thereby, as was contended, leaving the note unsettled, the award was not rendered void. And that such direction to deliver did not constitute an excess of authority.

3. That an award (under an action of replevin for a promissory note) that declared the defendant to have detained the note illegally, and at the same time awarding that it should be delivered up upon payment of a certain sum (which amount was due thereon), was not void for inconsistency, as it effected substantial justice between the parties.

*J. Duggan, Q. C.*, obtained a rule *nisi* in the Practice Court, returnable in banc, calling on the plaintiff to shew cause why the award made by *J. Cameron* and *Jas. Woodyatt*, two of the arbitrators, should not, or some part thereof should not, be set aside.

1st. Because the award was not final and did not dispose of all the matters in difference, nor distinguish between the action and the other matters in difference as to the finding and damages.

2nd. That the award directed defendants to pay a sum of money to plaintiff, but did not state for what it was to be paid, whether for the detention of the promissory note referred to in the pleadings or for money due by defendants to plaintiff.

3rd. Because the award was uncertain in directing the plaintiff to deliver up the promissory note to the defendants, or one of them, without stating for what purpose; and for awarding that defendants unjustly detained the note, having also awarded that it should be given up to defendants.

4th. That the award was void in directing mutual releases of all matters in difference in the manner therein directed, and in directing the delivery to defendants, or one of them, of the promissory note therein referred to, as it leaves the amount of the note unsettled and subject to be endorsed or transferred away.

5th. That the arbitrators had exceeded their authority in deciding questions of law, and infringing upon legal rights in directing the delivery to the defendants, or one of them, by plaintiff of the note.

6th. That the award was contrary to law, justice, evidence, and common sense; and there was no evidence whatever to support or found it upon.

7th. On grounds disclosed in affidavits and papers filed.

8th. That the action being replevin, the damages should only have been nominal, and the award should have been for defendants if plaintiff was not entitled to the note, which by the award it seems he was not.

9th. That the award is contradictory and inconsistent in awarding that the defendants detained the note, and also awarding that the plaintiff should deliver it up to the defendants.

The rule of reference was not produced at the argument in this court. It was recited in the award, and according to the recital the action above mentioned, and all matters in difference between the said parties, were referred to the award of Joseph D. Clement and John Cameron, and such other person as they should appoint, whose decision, or that of any two of them, should be final; the costs of the action and the reference to abide the event of the award. The award also recites that these two arbitrators did appoint James Woodyatt to be third arbitrator along with them.

The award was that the defendants Smith and Brooke did unjustly detain the promissory note in the pleadings in the action mentioned, and they found the several issues raised by those pleadings in favour of the plaintiff Lund. They awarded that Lund should, on payment or tender to him by Smith or Brooke of \$160, and interest at the rate of six per cent. from the 18th of April 1859 to the time of such payment or tender, deliver to Smith or Brooke, one or other of them, the said promissory note. That Smith and Brooke should, within ten days after the making the award, pay or tender to Lund the said sum of \$160 and interest as aforesaid, and that thereupon, and upon the delivery of the promissory note in manner aforesaid, each party should, if

required by the other, execute mutual releases of all matters in difference from the beginning of the world to the day of the date of the reference. The award was dated the 14th of November 1860, and was signed and sealed by John Cameron and James Woodyatt.

The action was commenced in the county court of the county of Brant, by writ dated the 20th of April 1859, and was removed by *certiorari* into this court. The declaration was for unjustly detaining a promissory note, dated the 16th of January 1859, for \$460, made by Jacob Shipman and Samuel Proper, payable one year after date. And the plaintiff claimed a return, and £10 for the detention.

*Pleas*—1. Not guilty. 2. That the note was not the plaintiff's. 3rd. That defendant Brooke being an attorney of the superior courts for Upper Canada, held the note as attorney for one Darby, who delivered it to defendant Brooke to sue for his benefit in the name of one George Smith. That a writ of summons was issued against the makers of the note at the suit of George Smith before this action was commenced, of which plaintiff had knowledge; that Brooke as such attorney and for that purpose detained the note. The plaintiff took issue on the first and second pleas, and demurred to the third.

The only affidavit filed was that of the defendant Brooke. The first four paragraphs contained no new matter. The 5th stated that a true copy of the evidence taken before the arbitrators was annexed. The 6th stated that on the 20th of November Mr. Cameron and Woodyatt made their award. The 7th stated that Clement refused to sign the award. The 8th stated what is apparent on the face of the award, that it did not shew whether the money ordered to be paid was for the detention of the note or for money owing to plaintiff. 9th, that he is not indebted to Lund, and no money was ever paid to him by Lund or anyone on his behalf. 10th, to a similar effect. 11th referred to a statement made in evidence before the arbitrators, and swears Lund paid him no money. 12th, that the award did not dispose of the action pending in the Court of Queen's Bench to recover the amount of the same note replevied at

the time of the reference. 13th, that the award was unjust, as the plaintiff declined paying the deponent money he paid on account of this note, and the money was sent to Darby. 14th, that deponent advised Smith to pay the money he had received from plaintiff on account of this note, but Smith said he had remitted it to Darby. 15th, that he had no pecuniary interest in the note, and merely acted in the discharge of his duty for the plaintiff in the action brought to recover the amount of said note. 16th, verified copy of the note annexed. 17th, verified the exhibits produced before the arbitrators by the defendants. 18th, stated that the exhibits put in by plaintiff were delivered up to the plaintiff's attorney, as he believed, by the arbitrators without his consent. (Note.—They were produced on the argument.) 19th, that the award was drawn up by the plaintiff's attorney and that he protested against it.

*Harrison* shewed cause, citing *Taylor v. Shuttleworth*, 6 Bing. N. C. 277, and *Duggan*, Q. C., supported the rule, citing *Gisborne v. Hart*, 5 M. & W. 50; *Williams v. Wilson*, 9 Ex. 90; *Lawrence v. Hodgson*, 1 Y. & J. 16; *Charlton v. Spencer*, 3 Q. B. 693.

DRAPER, C. J.—As to the first objection, I have looked at the cases of *Gisborne v. Hart* (5 M. & W. 50), and *Williams v. Wilson* (9 Exch. 90), cited by Mr. *Duggan*, but they do not sustain the objection for not distinguishing in the finding and damages between the action referred and the other matters in difference. The award disposes of all the issues in fact in favour of the plaintiffs, and I think we may judicially notice (though nothing was said about it on either side) that the demurrer was decided in the plaintiff's favour a year ago, and before the submission. It cannot therefore be said that the action is not disposed of, so that the master cannot tax the plaintiff his costs. The case in this respect must be governed by *Nicholson v. Sykes* (9 Exch. 357) and *Bradley v. Phelps* (6 Exch. 897), and the objection cannot prevail.

The second objection in one respect involves the same ground as the first. The case of *Lawrence v. Hodgson* (1 Y. & J. 16) does not touch it, though it is the only

authority cited by Mr. *Duggan* on this objection. There the decision was, that where it is referred to an arbitrator whether the defendants, or a third person, who for that purpose became a party to the submission, should purchase a piece of land specified, and he awarded that it should be purchased by the defendants or A. B., the award was bad for uncertainty; probably the case was intended to support the third objection. There appears no reason to sustain this.

The third is for uncertainty, but the award is that the two defendants shall pay the \$160. The latter part of this objection is renewed again in the 9th objection, and will there be disposed of.

I do not perceive the bearing of the fourth objection, unless it is meant to be sustained in fact by the twelfth paragraph of Mr Brooke's affidavit, in which case the answer is obvious. This action is not brought on the note, for neither defendant is a party to it, and the action in the Queen's Bench, mentioned in the affidavit, is not referred to the arbitrators, nor is it shewn to have been a matter in difference between these parties. As to the award of general releases, the award appears to me unexceptionable.

The fifth objection is excess of authority; but the possession of the note and the right to it, so as to collect it, was a matter in difference between these parties. *Charlton v. Spencer* (3 Q. B. 693), cited for the defendants, does not support the objection. No doubt, exceeding the authority given to the arbitrator is a good objection, but I fail to perceive in what respect there has been such excess.

Nothing was said in support of the sixth objection.

As to the 7th, I see nothing in Mr. Brooke's affidavit not involved in one or other of the objections specifically taken.

The eighth and ninth objections may be taken together.

The action is replevin for a promissory note. The pleas—not guilty, and that it was not the plaintiff's property. The replevy—put the note into the hands or under the control of the plaintiff as soon as he gave the proper bond to the sheriff. The plea of not guilty, I suppose, can only put in issue the detention charged, for which, under our statute, the writ of replevin may issue. On this plea the defendants

would not be entitled to a return. If the plaintiff had failed on the plea of the note not being his property, the defendants would have been entitled to a return. But it was shewn that the plaintiff was only interested in the note to a limited extent, \$160, which he had paid to Smith, and if this were paid him it should go back to the defendants. This was a matter in difference, though not raised in the action. Hence in the action the award is in the plaintiff's favour; but on the general reference the arbitrators have so moulded their award as to do justice to the defendants as well as to determine the issues in the suit in the plaintiff's favour. These objections would come with more propriety from the plaintiff. The defendants are complaining of a matter which enures to their benefit. There is nothing really repugnant or inconsistent in the decision.

No objection was taken to the manner in which the evidence was brought before us, nor that some of the objections are rather matters of fact than of law. As I am of opinion that the rule must be discharged on other grounds, I merely notice these latter points for the purpose of saying I have not felt it necessary to consider either in order to come to a decision.

*Per cur.*—Rule discharged.

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### MILLER V. CUMMINGS.

*Payment—In purchase of land—Appropriation of money—Recovery of on common counts.*

A party purchasing land through the persuasion of another (who did not pretend to have a title himself), with notice of an incumbrance thereon, and making no search at the registry office, and paying the consideration to the person through whose persuasion he purchased, who appropriated it with his knowledge and consent towards the payment of the incumbrance as far as it went,

*Held* that it was not recoverable upon the common counts from the party to whom he paid it.

WRIT issued 6th January 1860.

The first count of the declaration stated that on 20th April 1856 defendant represented to plaintiff that one Thomas Scott was seised in fee of 75 acres of No. 17, 6th concession Murray, and that in consideration that plaintiff would pay

defendant £200 for the fee simple of that land defendant promised plaintiff to procure Scott to convey the fee simple and inheritance of the land to plaintiff when thereto requested. That plaintiff did pay defendant £200, and requested defendant to procure Scott to convey to plaintiff the fee simple and inheritance in the said tenements, and that he, plaintiff, was willing to receive the same, whereof defendant had notice.

Breach, that though a reasonable time has elapsed, defendant hath not procured Scott to convey and assure the said tenements to plaintiff in fee simple, and that Scott sold and conveyed the same to one Redmond, and thereby disabled himself from conveying the same to plaintiff.

Common counts.

*Pleas* to the first count—1st. Traversing the making the representation to plaintiff that Scott was seised in fee.

2nd. Traversing the making of the agreement between plaintiff and defendant.

3rd. Traversing the alleged payment of £200 by plaintiff to defendant.

4th. Traversing the allegation that Scott conveyed the premises to Redmond.

5th. That Scott and plaintiff agreed between themselves without defendant for the sale by Scott to plaintiff of the said land for £200; that Scott did afterwards "*deed*" the land to plaintiff, who received the deed from Scott, and afterwards went into possession and sold and conveyed the same to one Rykman; that from the time Scott conveyed to the plaintiff, and until plaintiff conveyed to Rykman, plaintiff had peaceable possession of the land, and that Rykman has had peaceable possession since.

5th. That after the purchase in the first count mentioned, plaintiff conveyed to Rykman, who ever since has had peaceable possession.

To the common counts, never indebted.

The case was tried at Belleville in November 1860 before *Burns, J.* For plaintiff it was sworn that four or five years before the trial plaintiff and defendant had some talk about land in Murray, and defendant mentioned the number of the

lot, and plaintiff thereupon went there and found one Scott living on it, who shewed plaintiff the land. Shortly after a bargain was made between plaintiff and defendant. Plaintiff agreed to pay \$800, and defendant said he would guarantee that Scott would give the title when plaintiff went there. On 12th May 1856 Scott executed a common deed in fee to plaintiff of the land in question, which was registered on 8th September 1856. In 1859 another conversation took place between plaintiff and defendant referring to some new deed which it was said Scott was to give. Speaking of the deed of May 1856, defendant said he knew that deed was not good, and being asked, why then had he guaranteed that Scott would give the title, he replied that he had not done so in writing, and could not be hurt for it. The witness who gave the foregoing testimony was a brother-in-law of plaintiff's, and brother of the man to whom plaintiff transferred the land after having taken possession. This witness swore he heard nothing of a mortgage to Mrs Redmond. He represented plaintiff as a simple man. Another witness proved that Scott executed the deed at Frankfort, and defendant received the consideration from plaintiff—\$600 in cash, a note against one Long for \$110, and two notes payable at a future day, each for \$45, made by plaintiff, and this witness said that before the deed was given he heard plaintiff and defendant talk over the bargain thus: that defendant was selling the land, and was to procure Scott to give the title. After Scott executed the deed defendant gave it to plaintiff, and defendant, plaintiff, and witness returned from Frankfort to Trenton. Before going to Trenton defendant said he had a mortgage on the place, but before Scott signed the deed defendant said the mortgage was in another person's hands, and on their return to Trenton defendant said that \$300 of the mortgage belonged to Mrs Redmond and the remainder to himself, and that he would go and see her. He went, and soon returned and said she was not at home, but that he would guarantee the mortgage should not come against plaintiff; he repeatedly said this. This witness said he understood from defendant that Scott owed him \$700, and that only \$50 of the purchase money

coming from plaintiff would belong to Scott, and Scott said the same thing. Defendant represented then that he had pledged the mortgage to Mrs. Redmond for \$200 or \$300. Daniel Rykman, to whom plaintiff had conveyed the land, stated that he was in possession and desired to retain it, but that he had received a lawyer's letter to the effect that Scott's son claimed it. He said he had refused to pay what he still owed plaintiff for the land until his title was made perfect. He had applied also to defendant, who said Scott should make it all right. He confirmed the first witness' statement of the original bargain, and that defendant said he had not guaranteed in writing, and could not be hurt about it. The defendant also said that Mrs. Redmond had transferred to one Comstock, who had transferred to Scott's son. The deed from Scott to Mrs. Redmond was put in as part of plaintiff's case. It bore date 30th April 1852, and was an ordinary deed of bargain and sale for the premises in question, and was registered on 19th October 1852.

For the defendant it was objected that the declaration was not framed in *tort*, but on a contract; and that unless a written promise or guaranty was proved the first count was not supported; that there was no consideration for defendant's alleged promise to plaintiff, as it did not appear he had any interest in the question. Leave was reserved to defendant to move to enter a nonsuit. The defendant then called Thomas Scott, who swore he was indebted to defendant in about \$100; that being indebted to Mrs. Redmond he had given her the deed, and had taken a bond from her to reconvey on being paid between \$600 and \$700. Defendant applied to Scott for payment, who said he could not pay him unless he could sell his farm; then plaintiff came to look at it, and Scott asked \$800. Afterwards plaintiff and defendant, and Dyer (one of plaintiff's witnesses) came, and plaintiff agreed to give \$800, and Scott executed the deed. Defendant said he would guarantee the mortgage to be paid, and therefore the money was handed to him. The same day defendant paid Mrs. Redmond, and the mortgage was released in Scott's presence. The witness explained that about a year after he made the deed to Mrs. Redmond one

Comstock wanted the property, and he and Scott went to her about it; he paid her \$50, and she gave him a deed of the land and took a mortgage from Comstock to herself, and it was this latter mortgage that was paid off. After this Comstock ran away, and Scott wrote to him that if he did not mean to keep the place to re-convey it to Scott. Comstock did send a deed, but the proof of it for the purpose of registry was informal, and owing to this defect a memorial of this deed was refused registry. Scott then returned the deed to Comstock, and, as he swore, wanted a deed to be made in the name Rykman, but instead thereof Comstock, on the 24th March 1860, conveyed the land to Washington Scott, Scott's son, and executed a memorial thereof, which has not however been registered. Scott swore that the money from plaintiff was handed to him, and he gave it to defendant to pay off the mortgage, and in fact defendant had to pay, and did pay, more than the \$600, which was all the money the plaintiff paid; that the bargain for the sale of the farm was made with him, not with defendant; that the only guaranty the defendant gave was that he would see the mortgage paid, and that defendant did pay it in Scott's presence.

The learned judge directed the jury that if they believed Scott they should give a verdict for defendant; but if they disbelieved him, and believed that Comstock never conveyed his interest to Scott, then it might be open to the plaintiff to contend that defendant sold the land.

The jury found for plaintiff, with damages £200.

In Michaelmas Term *Richards*, Q. C., obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved, or for a new trial without costs, the verdict being contrary to law and evidence, and against the judge's charge, and that the damages were excessive, and for the discovery of new evidence. He filed an affidavit from one Roblin, who drew the deed from Scott to plaintiff, and was present when it was executed. He swore that the Redmond's mortgage was mentioned, and that it was to be paid out of the proceeds of the sale by Scott, and that he warned the plaintiff Miller to be duly

cautious about the title of the land from Scott, and that he (Roblin) had no abstract of title before him when he drew the deed.

*Walbridge*, Q. C., shewed cause; he admitted that he could not contend that the evidence entitled the plaintiff to recover on the first count. But he insisted the plaintiff might recover on the common counts. He contended the learned judge was wrong in directing the jury that even on Scott's evidence the defendant was entitled to succeed. He cited Story on Sales, 157; *Arnot v. Biscoe*, 1 *Ven. Sen.* 95.

*S. Richards*, Q. C., contra, referred to *Coe v. Clay*, 5 Bing. 440; *Neate v. Harding*, 6 Exch. 349.

DRAPER, C. J.—I think the rule for entering a nonsuit should be made absolute. The plaintiff's counsel abandoned the first count on the argument, and rested his case on the count for money had and received, and his contention, as I understand it, is that the defendant received this money either without consideration or on a consideration which has failed.

Some of the facts are undisputed. 1st. That the defendant did not pretend to have any right or title to convey the land, but that, 2nd, he referred the plaintiff to Scott, and that plaintiff communicated with Scott. 3rd. That plaintiff, before he paid his money and before Scott made the deed, had notice that there was a mortgage on the property, which defendant, according to one of plaintiff's witnesses, represented was a mortgage to himself, for so I understand the phrase "he had a mortgage," but he also stated it was in another person's hands. 4th. That plaintiff made no search at the registry office or any enquiry into the title.

But it is urged on plaintiff's behalf that upon Scott's executing the deed he paid the money and notes making up the consideration to defendant, and therefore has the right to look to the defendant for it, because he got either no title at all or an insufficient and defective title from Scott. In one point of view this may be regarded as an assertion on the plaintiff's part of a contract with defendant, in pursuance of which he made the payment to defendant. Scott says

expressly that the payment was made to him, but whether made to him or to defendant I think no other conclusion can reasonably be drawn from the whole evidence than that the money was placed in defendant's hands, whether by the plaintiff or Scott, for the express purpose of discharging an incumbrance on this land, and that the defendant without delay applied all the money he had received, and somewhat more, to that purpose, and that this appropriation of the money was made by the direction, authority, or consent of the plaintiff. If so, I do not see on what ground the plaintiff can claim this money from defendant as money had and received to his (plaintiff's) use, after the defendant has applied it to the purpose for which it was paid him.

I do not find it stated on the notes of the learned judge that any objection was urged to the evidence given by Scott of Comstock having made a conveyance to him prior to conveying to Scott's son. It certainly does not appear at what time that alleged deed was given, and so far, therefore, it was not shewn that Scott had any title at law to the land in question on the 12th of May 1856; but there is no evidence to shew that the defendant knew of the conveyance which it is said had passed between Mrs. Redmond and Comstock. He had known Scott in possession as owner, subject to his mortgage to Mrs. Redmond, and he does not appear to have concealed the fact that there was an incumbrance—though it is sworn he represented himself as the holder of it, which was not true. At the trial the plaintiff's evidence put the case on the assertion that the defendant had guaranteed that Scott would give plaintiff a title—not meaning thereby simply a conveyance, but a good title to the estate. The idea of recovering on any of the common counts does not appear to have then arisen.

It is inconceivable that if the plaintiff had supposed in the first instance that Scott had an unencumbered title he would not have withheld payment of the purchase money as soon as he heard that the property was mortgaged; but apparently being fully aware there was an encumbrance, he paid his money with the intention that defendant should apply it to discharge that encumbrance. I see no reason for thinking

otherwise than that both plaintiff and defendant supposed the payment to Mrs Redmond would make the title clear, and vest it through Scott's conveyance in the plaintiff; and I can see no ground for holding that any duty was cast upon the defendant to make searches and enquiries into the facts in order to ascertain that they continued to be—as at one time certainly they were—when a discharge of Mrs Redmond's claim would be deemed all that was necessary.

I do not perceive that by a decision against this action the plaintiff is left without remedy. It was suggested during the argument, that if, as was strongly urged, all the plaintiff desired was to have the title made good, he would probably find a complete remedy in equity. For some unexplained reason the plaintiff's counsel seemed desirous of making this verdict a lever to force a title from Scott's son, rather than to invoke the aid of a court having authority to do complete justice between all the parties.

*Per cur.*—Rule absolute.

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### BANK OF UPPER CANADA V. UPTON, BROWN, & COTTON.

#### *Promissory note—Endorsee—Evidence.*

In an action on a promissory note made by defendants U. and B. and endorsed by C., the endorser C. having been offered as witness for defendant U., and rejected at the trial,

*Held* that the endorser is not a competent witness for the maker, in deference to the decision of the Court of Q. B. in *Moffat v. Robertson*.

This action was brought by a specially endorsed writ of summons on a promissory note, dated the 30th March 1857, made by Upton and Brown for £600, payable to Cotton or order three months after date.

The defendant Brown did not appear, and the plaintiffs signed judgment against him, and declared against Upton as maker and Cotton as endorser of this note, stating that Cotton endorsed to one William J. Anderson, who endorsed to plaintiffs.

The defendants Upton and Cotton joined in two pleas, which were subsequently given up, though they remained on the record.

3rd. Pleaded subsequently by consent by Upton alone

that he and Brown made the note and delivered it to Cotton, and Cotton afterwards endorsed the same in blank and handed it over to one Charles E. Anderson for a special purpose—to wit, that he might get the same discounted for Cotton and pay over the proceeds to Cotton. That the said Charles E. Anderson did not get the note discounted and pay over the proceeds to Cotton, but in violation of the purpose for which he held the note, and without the consent or authority of Cotton, or of Upton and Brown, or either of them, he handed over the note to the said Wm. J. Anderson; that there never was any value or consideration for Charles E. Anderson handing over the note to Wm. J. Anderson, and there never was any value or consideration for his endorsing it; and Wm. J. Anderson, after endorsing the note, handed it over to plaintiffs, and plaintiffs never paid any value or consideration for the note or the delivery of it to them, and are now suing as trustees for Wm. J. Anderson and Charles E. Anderson, or one of them, and the plaintiffs became the holders thereof after it became due.

4th. By Upton alone. That Wm. J. Anderson did not endorse the note to the plaintiffs.

The plaintiffs took issue on all the pleas.

The trial took place at the last fall assizes at Toronto before *Richards, J.* The plaintiffs called Charles E. Anderson, who proved the endorsement by Wm. J. Anderson. On cross-examination he stated that he got the note from Cotton, that he paid it to Wm. J. Anderson before it became due. That he had for years been in the habit of advancing large sums of money to Cotton—lending him his paper and endorsing for him; that he was generally in advance to Cotton. When witness' acceptances were coming due Cotton would frequently bring him notes to get discounted to apply on the acceptances. On one of these occasions Cotton handed him this note, which witness handed to his brother with another note or bill, and wished him to get the money for it. This was in June 1857, before the note became due. Witness told Cotton he had used the note in this way, and that he must provide for it; Cotton said he would, and mentioned how; he repeatedly promised to have it paid. The witness

stated that at this time Cotton was largely indebted to him—giving some particulars; that he never was instructed by Cotton to get the note discounted for his (Cotton's) accommodation; Cotton said, Here is a note for £600, see if you can get it discounted; the witness had before this applied to Cotton for money; witness' brother is a broker, and witness got the money from him on the note before it became due; it was paid at maturity; it was left in the bank, as he thought; his brother, Dr. Anderson, recharged the witness in account, and was paid back what he paid witness; the plaintiffs had judgment against witness, and he wished them to sue this note and apply the proceeds to his credit; it was sued, he said, for his benefit as well as the bank's; the bank held it in consideration of money the witness owed them; the arrangement for the bank to hold it was made after the note became due, and, as he thought, after the bank had judgment against him.

For defendant Upton, James Cotton was called. He was objected to as not a competent witness. His counsel proposed to withdraw the pleas pleaded by him. The learned judge thought he could not at that stage allow it, and the witness, on the objection by plaintiffs' counsel, was rejected. William J. Anderson was called for defendant, and said he got this note from his brother Charles on the 18th of June 1857, and gave him a check for it and the amount of another acceptance; he endorsed it and placed it in the bank for collection, not discounting it; it was not paid at maturity; he said it was his impression he took the note out of the bank 10 or 15 days after it was protested and handed it to his brother, and charged it back to his brother. He then gave evidence as to another note for £600, being the note spoken of in the first and second pleas as the note declared upon, but which his evidence clearly showed it was not; he gave a long explanation on the subject, which, as it does not relate to the note in suit in this action, is omitted.

On cross-examination he said he had himself discounted this note—had advanced the money not knowing anything wrong about it; his brother assured him that before it would be due Cotton would be in a position to take it up; when

it became due it was protested, and about 15 days after his brother repaid him the money and took it up.

Another witness was called for the defence, but his evidence threw no additional light on the transaction.

The learned judge told the jury that if the note in question was really handed over by Cotton to Charles E. Anderson to be discounted, and the proceeds to be applied to discharge liabilities which Anderson was under for Cotton, or on an account which Cotton owed C. E. Anderson, they should find for plaintiffs.

They gave a verdict for plaintiffs, £717, 6s. 3d.

In Michaelmas Term *D. B. Read*, Q. C., obtained a rule *nisi*, on behalf of Upton, for a new trial on the law and evidence, and for the rejection of James Cotton as a witness, and because of the restriction placed on the cross-examination of the witnesses Charles E. Anderson and William J. Anderson, and because William J. Anderson did not endorse the note, and the plaintiffs had no right to sue as endorsees thereof and paid no value therefor, and are suing as trustees for one of the Andersons; and that one of the Andersons should have been plaintiff; that plaintiffs became holders after the note became due, and have no better title than Charles E. Anderson had, who could not sue, he having dealt with said note in violation of the purpose for which the same was delivered to him.

*J. H. Cameron*, Q. C., shewed cause, and cited *Moffatt v. Robertson*, 19 Q. B. U. C. 401.

*Read*, Q. C., in support of the rule, referred to *Marston v. Allen*, 8 M. & N. 494; *Atkinson v. Bayntun*, 1 Bing. N. C. 444.

DRAPER, C. J.—We must uphold the rejection of Cotton's evidence until a higher tribunal determines that persons in his situation are competent witnesses for other defendants on the same record,—we are bound by previous decisions.

Mr. Read's whole argument was directed to one point, namely, that on the evidence the plaintiffs were not entitled to recover against the defendant Upton (no rule was moved for Cotton) on the issue raised on Upton's plea, denying

that William J. Anderson endorsed the note to the plaintiffs. In support of his view he cited *Marston v. Allen*, 8 M. & W. 494; *Eden v. Turtle*, 10 M. & W. 635, which, however, turned upon a point of pleading; *Cranch B. White*, 1 Bing. N. C. 414.

As stated by *Wightman*, J., in *Bell v. Viscount Ingestre*, 12 Q. B. 317, the principle of *Marston v. Allen* is, that on a plea traversing the endorsement of a bill its delivery with intent to transfer an interest is put in issue. *Adams v. Jones*, 12 A. & E. 455, is founded on the same principle. These cases shew, in fact, that by denying the endorsement the defendant puts in issue the signature of the endorser, the delivery of the bill or note by him to a third party, and the intention of such delivery.

But to make these cases applicable to the present the evidence should have been of a character to sustain the allegations of the defendant Upton's first separate plea—to shew, in fact, that a fraudulent use was being made of Cotton's endorsement, and that it was not intended to transfer any interest from Cotton in the note; but the evidence given shews the contrary, and William J. Anderson himself says that he endorsed the note to the plaintiffs for collection, thereby giving them a qualified interest—as much right to collect as he had. It is true he withdrew the note from their hands after it was dishonoured, and returned it to his brother Charles, who repaid him his advance. He left his name upon it, and in that shape it was returned to the plaintiffs for collection by Charles, who, so far as the evidence discloses, was endorsee for value from Cotton. No doubt William J. Anderson might, before returning the note to his brother Charles, have struck out his endorsement; but I cannot understand that because he did not think it necessary to do so the defendant Upton can set up that the plaintiffs can derive no title from his endorsement, and that in claiming as his endorsees they are setting up a fraudulent claim, as in *Marston v. Allen*, and other cases of that character.

In my opinion the rule should be discharged.

In this case we have also an application before us from the defendant Brown to set aside the judgment against him,

and let him in to plead. The affidavits on which we granted the rule *nisi* go to establish that it was entirely owing to a misapprehension that he entered no appearance, supposing that as Upton was defending, his defence would enure to the benefit of both as co-partners, the note being made in the name of the firm, and stating that he applied for relief as soon as possible after he became apprised of his error.

It is unnecessary to decide whether, if we saw there was any defence on the merits, we could properly interfere at this late stage on the facts stated in these affidavits. It is not suggested that Brown has any other defence than Upton, and as we are of opinion the plaintiffs are entitled to retain their verdict against the one, they would equally have a right, in our judgment, to recover against the other. On this ground, therefore, the rule must be discharged.

*Per cur.*—Rule discharged.

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### HICKLEY V. GILDERSLEEVE.

*Right of Ferry—Disturbance of—Omission of possessor to furnish sufficient accommodation.*

Upon an action for the infringement of the right of a ferry,

*Held* that the omission to furnish full accommodation to any number of persons offering themselves to be ferried over is no defence to an action for a disturbance of an admitted right.

The declaration alleged that whereas the plaintiff, before and at the time of the committing of the grievances herein-after mentioned, was lawfully possessed of a ferry with the appurtenances between the township of Wolfe Island and the city of Kingston, for carrying and conveying between the said township of Wolfe Island and the city of Kingston all persons and their goodshaving occasion for the same, in boats kept by and by the authority of the plaintiff, taking for the same certain freights and ferriages—yet the defendant well knowing the premises, but contriving to disturb and injure the plaintiff in the peaceable enjoyment of his ferry heretofore, to wit, on the 12th day of July 1860, and on divers other days and times, unlawfully, injuriously, and wrongfully carried and conveyed divers passengers for hire in a certain

boat between the said township of Wolfe Island and the city of Kingston, over, upon, and within the said ferry of the plaintiff, and thereby, &c.

*Plea*—And for a second plea the defendant says that at the time of the committing of the alleged grievances in the declaration mentioned the plaintiff neglected and refused, and was unable, to carry over and across the said ferry all the passengers who presented themselves to be ferried over by reason of the great number thereof. Whereupon the defendant by and at their request did carry and convey over and across the said ferry such, and only such, of the said passengers as the plaintiff had so neglected and refused and was unable to carry over as aforesaid, and who would otherwise have been put to great inconvenience, vexation, and delay, and deprived of their right to cross the said ferry, which is the same alleged grievance complained of in his declaration.

*Demurrer* to second plea—That the neglect, refusal, or inability of the plaintiff to carry passengers affords no excuse for the wrongful act of the defendant.

*Kirkpatrick*, for demurrer, cited *Peter v. Kendal*, 6 B. & C. 703.

*C. S. Gildersleeve* contra, *Newton v. Cubitt*, 5 Jur. N. S., 847, C. P.

HAGARTY, J.—The plaintiff alleges his lawful possession of a ferry, and that defendant infringed his right by carrying passengers for hire over, upon, and within his said ferry.

Defendant pleads that at the time of the alleged infringement the plaintiff neglected and refused, and was unable, to carry over all the passengers who presented themselves, by reason of the great number thereof, wherefore the plaintiff, at their request, carried over the ferry such only of the passengers as the plaintiff had neglected and refused and was unable to carry over.

This plea is demurred to as affording no legal answer.

The case of *Peter v. Kendal*, 6 B. & Cr. 703, seems

expressly in point and in plaintiff's favour, and wholly opposed to the idea that an omission to furnish full accommodation to any number of persons offering themselves to be ferried over can be raised as a defence to an action for a disturbance of an admitted right. The grantee or lessee of the ferry might provide full accommodation for passengers for every day in the year but one on which an unusual number might unexpectedly require a passage. I cannot understand how such an occurrence could warrant an interference with his exclusive right by a stranger.

The late case of *Newton v. Cubitt*, 5 C. B. N. S. 628, recognises the same view. *Williams, J.*, says—"Here, admitting the invasion of the ferry, the defendants say that the convenience of the public required it. That clearly is a bad plea."

The Islington Market Bill, 3 Clk. & F. 513, and the two cases there cited—*Prince v. Lewis* (5 B. & Cr. 363) and *Mosley v. Walker* (7 B. & Cr. 40)—proceed on a very different principle. But the law is so clearly and fully discussed in *Peter v. Kendal* that it is unnecessary to do more than refer to it.

If the lessee of the ferry really fails in providing proper accommodation the appropriate remedy can be applied.

Judgment for plaintiff.

DRAPER, C. J., took no part in this judgment.

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### LYMAN ET AL. V. SNARR.

*Lease—Agreement to furnish steam power—How far a void lease may be referred to to ascertain the terms of letting.*

Plaintiff leased to one M., for a term of 10 years, certain premises in writing not under seal under certain terms, M. to furnish plaintiff with steam power to the extent of five horses. Defendant for some time carried on the business in partnership with M., and subsequently, a dissolution having taken place, continued the business himself. During the partnership a certain amount of steam power was provided for plaintiff by lessee. Plaintiff brings this action against defendant for not furnishing the *quantum* of steam power since the dissolution. Defendant denied his liability, setting up a yearly tenancy not under seal, and that he was not a tenant under the agreement entered into with M.

*Held* 1. That the agreement or lease to M. was void, not being under seal, but may be referred to for the terms of the letting.

2. That his promise to furnish power, &c., is an implication of law arising out of the facts and situation of the parties.

The first count of the declaration was for use and occupa-

tion, and for money paid. The second count stated that the plaintiffs let to defendant a steam saw mill and premises for one year, and defendant promised to pay £25 rent, payable half-yearly, and two thirds of the insurance on the premises, and to furnish steam power to the amount of three horses to be used by plaintiffs in their mill and factory at all reasonable times, and to pay all increased insurance above the rate previously paid by plaintiffs caused by the hazardous nature of defendant's business. Breach, non-payment of the first half-year's rent, and non-payment of two-thirds of the insurance, or the increased insurance amounting to £25, and not furnishing steam power to the amount of three horses to be used by plaintiffs although requested, *whereby plaintiffs lost the use of their machinery which should have been driven by such steam power, &c.* Plaintiffs claim £200.

*Pleas*—1. Never indebted. 2. Set off. 3. Denial that plaintiffs let to defendant a steam saw mill, or that defendant promised to pay rent, &c. 4. Plea demurred to, and judgment for plaintiffs on the demurrer. 5. Payment of £200 in full satisfaction of all the causes of action in the declaration.

The case was tried in April last at Toronto before *Hagarty, J.* It appeared that in 1850 Richard Kneeshaw, William Lyman, and the two plaintiffs carried on business under the style of Lyman, Kneeshaw & Co., and on 13th September 1850 they made an agreement in writing to give a lease for ten years of the premises mentioned in the second count to one Alexander Manning on the terms set forth in the declaration, and Manning took possession under this agreement. Defendant afterwards became a partner of Manning, and was in possession of these premises jointly with him, and in the beginning of 1854 defendant became sole occupant. On 22nd October 1856 the defendant and these plaintiffs had a settlement, Kneeshaw and William Lyman having in some way previously retired, and defendant gave a note for the rent, which was settled at £25 per annum, and for his share of the insurance for the previous years, during which Manning and defendant at first, and afterwards

defendant alone, had supplied the steam power. According to the understanding come to, defendant was to pay £25 per annum rent, £3, 10s. being two-thirds of the insurance on the premises, and £11, 5s. on the increased rate, and he paid rent and the insurance items on this basis for the year ending October 1857. The plaintiffs gave evidence of the stopping of their machinery and the non-supply of steam power from the end of July 1857 to the beginning of this action, shewing the number of days. When applied to after October 1857 for rent and insurance money, the only objection the defendant made was that he had a claim on the plaintiffs for damages occasioned to him by the construction of the esplanade in front of the city of Toronto, which esplanade interposed dry land, &c., between these premises and the waters of the bay. Before plaintiffs would recognise defendant as standing in Manning's place, they required a settlement of the previous rent and insurance, which was effected in October 1856, and after this defendant paid a year's rent, so far as the money payment is concerned.

For the defendant it was objected that there was no reason shewn why Kneeshaw and William Lyman were not joined as plaintiffs. That as to the second count the evidence shewed no letting for a year, for the original agreement was for ten years, and the agreement in 1856 was for four years, the residue of the term of ten, and not being in writing was void ; that the plaintiffs seek to recover for special breaches of the agreement to furnish steam power, which agreement was not to be performed within a year, and was void, not being in writing. Leave was reserved to the defendant to move for a nonsuit on the second count if the evidence was in the opinion of the court insufficient to support it.

Subject to this the learned judge left it to the jury to say if defendant was tenant to plaintiffs from October 1857 to October 1858 at the rent mentioned, and to furnish steam power and to pay insurance. He left the facts attending defendant taking and continuing in possession to the jury, together with the terms expressed in the written agreement with Manning, as evidence on this head. The jury found for plaintiffs, damages \$309.

In Easter Term *M. C. Cameron* obtained a rule *nisi* for nonsuit on the leave reserved on the second count, and for a new trial generally on the law and evidence, and for misdirection, or to reduce the verdict to £12, 10s., the rent for half-a-year.

In Trinity Term *Hector Cameron* shewed cause, contending that the verdict was maintainable on the counts for use and occupation. The plaintiffs are not suing upon the agreement made with Manning, and to which the four partners of Lyman, Kneeshaw & Co. were partners, but the use of these premises by defendant after two of these partners had left the concern. The object of reference to that agreement was merely to ascertain the basis on which the rent was originally reserved. The settlement of October 1856 and defendant's subsequent payment furnished evidence, independently of the agreement, sufficient to charge him for actual enjoyment.

*M. C. Cameron*, contra, insisted that the plaintiffs were seeking for damages for breach of a special agreement, which required to be in writing and signed by defendant in order to bind him, and there was no such agreement. That under the count for use and occupation plaintiffs could not recover more than £12, 10s., and he did not dispute their right to that sum, but they gave no evidence to entitle them in law to recover more.

He cited *Mechelen v. Wallace*, 7 A. & E. 49; *Vaughan v. Hancock*, 3 C. B. 766; *Wells v. Horton*, 4 Bing. 40, 43, per *Best*, C. J.; *Poultney v. Holmes*, 1 Str. 404.

HAGARTY, J.—The difficulty in this case is as to the legal proof of a contract by defendant to furnish steam power. No direct promise is proved, and the only evidence relied on is that under the written agreement for the ten years between plaintiffs and Manning, this was one of the terms of the tenancy, and that defendant entered under or in privity with Manning, and occupied for several years paying same rent. The memorandum is void as a lease, a tenancy from year to year was created, and the agreement may be referred to for the terms.

*Buckworth v. Simpson*, 1 C. M. & R. 834, was assumpsit for not repairing premises, alleging a holding for one year, and then from year to year till six months' notice by either party. An agreement was set out in writing shewing a letting by three trustees of plaintiff, then a minor, to one Barber to that effect, dated in 1805, shewing promises to repair and leave in repair, &c.

The count then averred plaintiff's coming of age in 1815, and that in consideration that he had undertaken to let the premises to Barber on the same terms as in the agreement, Barber promised to perform all things therein; that in 1821 Barber, by will, directed the defendant and another to continue his business; that defendant's proved will and that all Barber's interest came to them by assignment; then it averred a similar provision by defendant to perform the agreement. Breach—his non-repair of premises after years of occupation. Other counts varied the statement. Pleas—General issue and Statute of Limitations, by one defendant.

At the trial the agreement and occupation were proved. It was objected there was no express agreement by the executors to hold as alleged, and that the legal estate was not in plaintiff, but his trustees. After verdict for plaintiff and motion for new trial judgment was given for plaintiff. Lord *Abinger* says—"Enough is stated to raise the promise on the part of defendants, and the declaration appears to be good."

*Parke, B.*—"The question is whether this promise can be implied by law. I am of opinion that it is an implication of law arising from the situation of the parties. \* \* \* If the tenant assigns and the landlord does not give notice, the assignee must hold on the same terms. That contract the law will imply, otherwise the consequence would be that no action could be brought on the original demise when there is an occupation from year to year and the tenant assigns, for there is no contract whatever unless the original contract is transferred by operation of law. It is contended that the executors of the original landlord, where he is dead, must bring an action against the personal representatives of the original tenant. That would be very inconvenient, and therefore it is better to hold that a new relation of landlord

and tenant arises by implication from the situation of the parties where there is a continuance of the occupation and an omission by those who represent the original parties to give notice to quit."

*Arden v. Sullivan*, 14 Q. B. 832, was also assumpsit for not repairing. Original assigned was on a written agreement for three years, the plaintiff and one Twynam demising to defendant. Twynam assigned to plaintiff, defendant occupied for the three years, and after knowing of the assignment to plaintiff paid rent to him alone.

*Patteson, J.*—On the assignment to plaintiff a new reversion was created, and defendant by continuing to hold possession and to pay rent, continued the estate from year to year under the assignee of the reversion, and as a contract not under seal does not pass with an assignment of the reversion, the question has arisen whether there is any ground for presuming that defendant, continuing to hold the same estate, agreed with the new reversioner to hold on the same terms as he had held under the original reversioner. If he did, the original agreement may be taken as rescinded, and the new agreement as substituted. \* \* And as in the judgment of *Parke, B.* (in *Buckworth v. Simpson*), such an agreement is said to be implied from such a state of facts, the declaration in this case may be supported. We do not mean to say that such an implication may not be rebutted, but without any evidence to the contrary such an implication ought to be made.

In *Hyatt v. Griffiths*, 17 Q. B. 505, there were two lessees in a four years' lease, one lessee assigned to the other, who remained several years after the term had expired. Sir Wm. *Erle* left it to the jury to say "whether though there was no express evidence of any term of demise from year to year, they concluded from the facts proved that the landlord demised, and the plaintiff (the tenant) accepted the lands on the terms alleged, *i.e.*, setting up a claim as to tenants having a right to a way to growing crop after end of term. The court upheld verdict for plaintiff.

*Brydges v. Lewis*, 3 Q. B. 605. This was a case of demise not under seal for seven years, and lessors, during

the term, conveyed in fee to plaintiff, who sued tenant in assumpsit for breach of certain terms not stated. The only plea was a traverse of the tenancy on the terms stated. Nonsuit was asked on the ground that the suit must be by original lessors. The verdict was for the plaintiff, and the court refused to disturb it.

Lord *Denman* said:—"There is no doubt but that defendant by the conveyance and by the operation of statute 4 Ann, ch. 16, sec. 9, became tenant to the plaintiff without any formal attornment. Nor can it be doubted that he was tenant upon the terms contained in the lease under which he entered. There is no plea of non-assumpsit nor any other which raises any question as to the existence of a contract between the plaintiff and the defendant." The latter point he subsequently speaks of as doubtful.

As to the sufficiency of the special count, on which alone a recovery can be had for the steam power, I consider if there be clear evidence to support a recovery on a properly framed count, that we ought to make any reasonable amendment, and prevent a fourth trial of a cause involving an amount under £100.

It appears to me that if the count had, as in the case already referred to of *Buckworth v. Simpson*, set forth the whole transaction from the date of the first taking in 1850, stating the legal effect after the first year as a tenancy from year to year, determinable by six months' notice to quit (in Lord *Abinger's* words, "the rule is that a party may in his pleadings set forth his whole case, and the court may determine the legal effect of it"), then a consideration could be stated for the defendant's promise to give the steam power, &c., and to perform the other agreements of his predecessor, averring the plaintiff's abstaining in respect thereof from giving the six months' notice and determining the tenancy, or I incline to think that the agreement could be rested on what took place between the present parties to the suit on 22nd October 1856, averring a taking for one year, and thenceforward from year to year, so long as all parties might think proper, either of them giving six months' notice of

intention to determine the tenancy at the end of any one year, and the consideration for promising to pay and perform conditions for each continued year being the omitting to give such notice ; the authorities seem to support this.

As to the amount of the verdict, \$309 or £77, 5s., I think it very easily arrived at without going beyond the one year, from October 1857 to 20th October 1858. The action was commenced before that year expired, viz., 11th September 1858.

One half-year's rent is admitted, £12, 10s.; plaintiff's witnesses calculated 313 working days in that year, but from this we can deduct 39 days from September 11th to October 20th, less say six Sundays; 33 days.

313 working days.

Deduct..... 33

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280

at 7s. 6d. per day, being his estimate of value of steam power, and the sum they paid Hamilton therefor.

280 days at 7s. 6d., \$420

Rent..... 50

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\$470

besides any damages as to insurance. The verdict was only \$309.

The jury do not seem to have allowed more than 5s. per day, which with the rent would be \$330, and a larger sum than the verdict.

*Per cur.*—Rule discharged.

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## KRAEMAR V. GLEES.

*Married woman—Contract by—Consol. Stat. U. C., ch. 73.*

G. having recovered a judgment in a division court against one D. on a note made by her after her marriage to K (the present plaintiff), under execution founded thereon, he seizes goods, &c., which were the separate property of D. (wife of K.), under Consol. Stat. U. C., ch. 73, for the detention of which goods this action was brought.

*Held* that the statute does not enable a married woman to bind herself as a *femme covert* to a greater extent than she was able to do before the passing thereof.

2nd. That an action on a contract made by a married woman before marriage will not lie against her *without* her husband being joined with her therein as a party, *he being a resident within the province.*

3rd. That an action will lie against a party seizing separate goods of his wife out of possession of her husband.

DECLARATION stated that defendant wrongfully deprived plaintiff of the use and possession of his goods, enumerating them.

Second count—That defendant converted to his own use the plaintiff's goods and chattels.

*Pleas*—1st. Not guilty. 2nd. Goods not plaintiff's.

The case was tried at Berlin in November 1860 before *Hagarty, J.*

The goods were seized in August last, by direction of the defendant, on the plaintiff's premises under two executions issued out of the division court, in suits, in one of which the defendant was plaintiff, and Barthold Froehly and Dorothea Kraemar were defendants. Dorothea Kraemar is plaintiff's wife, and Froehly is her son-in-law. By the sale more than enough to satisfy these two executions was made, and the residue was applied in satisfaction of another execution against Froehly, who lived in the same house with plaintiff and his wife. This was because this bailiff assumed that part of the property seized, and for which this action was brought, belonged to Froehly; and the bailiff swore that sometimes he would claim the property and sometimes Mrs. Kraemar. It appeared that she had been a widow, and plaintiff used to live as a servant with her, and afterwards in January 1860 married her. The plaintiff was present at the sale, but said nothing. Froehly swore that the oxen which were seized and sold belonged to the plaintiff before he married the widow, and that the notes sued upon in the

division court were made after the marriage, and in the absence of plaintiff. That plaintiff got the yoke of oxen from the widow a year before he married her for his wages for the preceding year. Froehly had lived with the widow several years; he worked the cleared land on the farm on shares. The plaintiff was clearing more land for himself and his wife. Excepting the oxen, Froehly swore the rest of the property in question had belonged to the widow, but that he understood that after marriage she gave it all up to the plaintiff. The notes sued upon were given in lieu of others which became due in the preceding fall. He explained that the thrashing machine, waggon, and sleigh were hired to him, and therefore he claimed them when an execution came against her; if an execution came against himself he told what was hers and what was his own.

On the defence it was sworn that the defendant's son and not the defendant directed the seizure; that it was the son who bought the things and not the defendant, the prices of which were endorsed on the execution as cash, and so accepted by defendant, which things the defendant sold for the son's benefit as part of the son's "share of inheritance" from defendant. The defendant, it was however stated by the son, was at the sale and bought a whippetree. Another witness swore he had purchased the oxen before the bailiff's sale from the plaintiff, both from him and his wife after their marriage, giving up two notes he held against her for the price; no time was fixed when he was to take them, and he allowed them to be worked on their farm. He said he thought he could have taken them when he liked, but that he only took them in security for the debt, though he was willing to have taken them in payment. There were writings shewing the nature of the transaction not produced.

The jury were asked to say whether the defendant directed the seizure, and whether the oxen were the plaintiff's own property, and the learned judge asked them if they found both these points in the plaintiff's favour to assess damages for the taking the oxen separately. He ruled that as the evidence stood the defendant could not set up the claim of the third party to the ownership as an

answer to plaintiff. For the defendant it was contended that the wife must be joined with her husband as a plaintiff, and it was agreed that he should have leave to move on this point, and the learned judge directed that the plaintiff might sue alone.

The jury found for the defendant, but valued the oxen at \$65.

*Miller*, in Michaelmas Term, obtained a rule *nisi* for a new trial on the law and evidence, and because the verdict was contrary to the learned judge's charge.

*M. C. Cameron* shewed cause. He referred to the Consolidated Statutes of U. C., ch. 73, secs. 14 and 18, and to *Dunstan et ux. v. Burwell*, 1 Wils. 224; *Linch v. Hooke*, 1 Salk. 7; *Milnes et. al. v. Milnes et al.*, 3 T. R. 627; *Birch v. Leake*, 2 D. & L. 88.

*Harrison*, R. A., contra.

DRAPER, C. J.—There is no doubt of the general principle that marriage operates as an absolute gift in law to the husband of all the goods and chattels and personal property of the wife.

This action is not brought for the conversion of the goods of the wife before her marriage to the plaintiff, and therefore the cases of *Milnes v. Milner*, to which may be added *Morgan v. Cubitt* (3 Exch. 612), and *Dalton v. Midland Counties Railway Company* (13 C. B. 474), do not apply; *Ayling v. Whicher* (6 A. & E. 259), *Carne v. Brice* (7 M. & W. 183), and *Bird v. Peagrum* (13 C. B. 649), are in the husband's favour. Unless the provincial statute makes a difference I think there is no doubt the plaintiff has a right to recover.

The first section of that act declares that every woman married since the 4th of May 1859 shall and may have, hold, and enjoy all her real and personal property (if there be no marriage contract or settlement) "free from the debts and obligations of her husband, and from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried."

The second section applies to the cases of women married before the 4th of May 1859, and makes a similar provision as to real estate not on that day taken possession of by the husband, by himself or his tenants, and as to personal property not then reduced into the possession of her husband.

The fourteenth section enacts that every woman having separate property, real or personal, not settled by any antenuptial contract, shall be liable upon any separate contract made or debt incurred by her before marriage, if married after the 4th of May 1859, to the extent and value of such separate property, in the same manner as if she were sole and unmarried.

Section sixteen enables every married woman, after the 4th of May 1859, by devise or bequest executed in the presence of two or more witnesses, to dispose of her separate property, real or personal, whether acquired before or after marriage, among her children, issue of any marriage, and failing any issue, then to her husband, or as she shall see fit, in the same manner as if she was unmarried.

Section eighteen provides that in any action, &c., by or against a married woman upon any contract made or debt incurred by her before marriage, her husband shall be made a party if residing within the province, but if absent therefrom the action shall proceed against her alone.

This statute does not alter the power of a married woman to make contracts; she is not enabled to bind herself while a *femme covert* more than she could before it was passed. It appears on the evidence that the plaintiff's wife was sued without her husband being joined on a promissory-note made by her after marriage. Such fact, in my opinion, if proved before the judge, entitled her to have the action dismissed as against herself. The note was, as against her, void. If she had been sued upon a contract made before the marriage her husband should have been joined. Her marriage being proved would have been a bar to the maintenance of the action against herself, inasmuch as her husband resided in the province.

It may be questioned whether on the present pleadings it

was open to the defendant to set up the proceedings in the division court as a defence. The point was not taken, however, for the plaintiff; but if this defence was not available, then the defendant appears to have seized property out of the possession of the plaintiff, for, *prima facie*, this property (if it were all the wife's) was in the possession of the husband, and possession alone would enable him to bring this action against a wrongdoer.

As to the yoke of oxen, the verdict certainly appears to be against the evidence. They were not the wife's at the time of the marriage, and if in fact they were mortgaged to a third party, or even sold, neither of which was legally proved, the defendant shewed no right to take them unless they were the wife's, and therefore so far the verdict is wrong.

Still, a new trial ought not to be granted if the plaintiff cannot maintain the action without joining his wife, unless on the ground that the oxen were no part of her separate property, and if granted on that ground, we ought, I apprehend, to say whether if on the second trial it should appear these as well as the rest of the property seized were hers under the statute, the plaintiff alone can maintain the action.

Assuming for the argument's sake that the defendant is a wrongdoer as to the separate property, and that the husband can recover the full value in this action, could the wife under any circumstances maintain another action for the same injury after his death, pleading her coverture in answer to the Statute of Limitations, if that were set up in bar of her claim? The statute does not enable her to sue alone. Even for a cause of action accruing to herself before coverture the husband must be joined.

The eighteenth section expressly requires her husband to be sued with her if resident in the province, though the reason formerly existing, namely, his liability to pay her debts, no longer exists under the statute. She does not appear to have any means given her of compelling him to bring an action for injury to her separate estate, and yet it could not have been intended to put every wrong to her

separate chattel property, on the footing of *choses in action* belonging to her, which, unless reduced into possession by the husband, survived to her. Or if it does, I do not then see that it necessarily prevents the husband suing for such wrong without joining her.

The primary objects of this act seem to be—*First*, to protect a married woman in the right to her separate property free from the debts and the control of her husband. *Second*, to secure her earnings to herself under certain circumstances. *Third*, to enable her creditors to obtain satisfaction out of her separate property for debts incurred *dum sola*. And *lastly*, to relieve the husband from liability for such debts, though he must be joined in the action against her if he be resident in the province.

Every provision for these purposes is a departure from the common law. And so far as is necessary to give these provisions full effect we must hold the common law is superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the act was intended to give. I do not perceive that any of these provisions, either in letter or spirit, require us to hold that chattel property which belonged to the wife before marriage, is not by the marriage placed in the hands and under the protection of the husband, though no longer subject to his debts or to his disposal. And if he has the right to the possession, although the right of property is to the extent set forth in the act preserved to the wife, I do not see why he may not sue alone for any injury or wrong inflicted on any part of that property.

I think there should be a new trial without costs.

*Per cur.*—Rule absolute.

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## WILSON V. WILSON.

*Trespass—Termor—Justification by—Proof of continuance of term to time of trespass.*

Upon an action for trespass in breaking and entering, and pulling down tenements, &c., the defendant justified as termor of the premises, with the right to remove buildings.

*Held* that he should have proved the existence of the term down to the time of committing the grievance complained of.

2. That a surrender in fact having taken place, a release for the rent under seal is not necessary.

DECLARATION—First count, for breaking and entering lot No. 15 on Broadway street, in the village of Tilsonburgh, and breaking open a shop thereon, and cutting and pulling down the same, and carrying away the building and materials, and converting the same to his own use, and breaking down fences, whereby plaintiff was prevented from letting the land advantageously.

Second count, for breaking and entering part of lot No. 4, 12th con. Dereham, described as village lot F, east side of Harvey street, Tilsonburgh, and breaking into a certain other building, &c., &c., as in first count.

*Pleas*—1st. Not guilty.

2nd. As to so much of the first count as relates to the building, that it was not the plaintiff's property, nor was he possessed thereof.

3rd. To first count—That plaintiff had demised the land to defendant for a term, which at the said time when, &c., had not expired, on the terms that defendant should be at liberty to remove any building he (the plaintiff) should erect for the purpose of defendant's carrying on therein his trade as a butcher. That defendant entered and became possessed of the land and of the said term, and during the term set up the said building, and in such a manner that the same could be removed without material damage to the land; and the defendant afterwards, and within the term, removed the building, and did necessarily a little break down the fences and a little injure the soil, doing no unnecessary damage—*quæ sunt eadem*.

4th. To the first count—Leave and license.

5th. To the second count—Plaintiff not possessed.

6th to second count—Leave and license.

Issue taken on 1st, 2nd, and 5th pleas.

Replication to third plea—That before the trespass in the first count mentioned the defendant's term expired; and the defendant agreed that in consideration the plaintiff would release and discharge him from the payment of the rent then due the defendant would deliver possession of the land and building; that the plaintiff did release the defendant from the rent, and the defendant did deliver possession to him of the land and building, and the plaintiff entered and took possession; and afterwards the defendant, of his own wrong, &c., committed the trespass. To 4th and 6th pleas, *de injuriâ*.

The case was tried at Woodstock in October last before *Hagarty, J.* The plaintiff's right to the lot referred to in the first count was admitted, for the defendant in his third plea set up that the plaintiff demised the land to him for a term not expired when the trespass alleged in the first count was committed, and the taking away the building complained of in that count was justified under the terms of the alleged demise. The evidence shewed the fact of taking away, and the whole question on the first count really arose upon the replication to the third plea, which set up that the term expired before the building was removed, and that in consideration the plaintiff would release and discharge the defendant from rent then due for the land defendant would deliver possession of the land and building to the plaintiff, and averring such release; the plaintiff asserted the defendant did deliver possession and plaintiff entered, after which these trespasses were committed. Two witnesses swore that in October 1858 there was a conversation between the plaintiff and defendant, in which the plaintiff agreed to give up the rent due to him by defendant, and the defendant in return gave up, or, as one witness expressed it, "turned out," the old building, the grocery, to the plaintiff; told him to take possession, and the plaintiff did get possession of this building—part of it at once, the whole in the June following. It was moved away by defendant after 10th June 1860.

The objection raised to the plaintiff's case upon the first

count was, that the replication was not proved—that it was only a conditional surrender of defendant's term, and that the condition, namely, the release of the rent, required to be by deed, and it was not proved. The learned judge reserved leave to the defendant to move to enter a nonsuit on this objection and the evidence.

The plaintiff also gave some evidence on the second count, and there was an objection taken that the removal of the building was charged in that count of the declaration only as aggravation to the breaking and entering the close; and that the evidence shewed this building, which the witness describes as the slaughter-house, stood upon land belonging to a third party, and that the plaintiff had no possession of or title to this land, or rather the evidence did not shew that plaintiff had possession or title to this land.

The learned judge also reserved this objection, with like leave to move to enter a nonsuit.

The defendant then went into evidence, and gave such further proof as to the lot mentioned in the second count as seemed to remove any doubt of plaintiff having any right thereto, or even being in possession at the time of the alleged trespass. As to the other lot, the defendant endeavoured to prove a distress by plaintiff for rent in 1859, but he failed in establishing more than the plaintiff's declaration that he would distrain. As to the grocery, one witness for the defence swore that about October 1858 the plaintiff said he had given the defendant the grocery, and another witness swore that he agreed to take the grocery from the defendant in October 1858 at \$4 per month, and the defendant gave him the key, but he did not enter into possession. That the plaintiff told him that if he could get the key he (plaintiff) would pay the witness the \$4 he had paid defendant, and let the witness have the shop and make it comfortable. It was probably in reference to this that one of the plaintiff's witnesses had stated that the defendant had agreed to give up possession to the plaintiff by a fixed day—the Tuesday following—and that the defendant said that if he kept it any longer he would pay the plaintiff the same rent that the man from Ingersoll would pay, namely, \$4 per

month for any time after Tuesday following. The case was left to the jury in the terms of the issue raised by the replication, that if the plaintiff gave up claim to rent the defendant gave up the building to the plaintiff.

The jury found for the plaintiff, and damages £15.

In Michaelmas Term *Beard* obtained a rule *nisi* to enter a nonsuit on the leave reserved. *D. G. Miller* shewed cause.

*Beard* supported the rule, citing *Taylor v. Cole*, 3 Term R. 296; same case in Error, 1 Hy. Bl. 555; *Pratt v. Pratt*, 2 Exc. 413; *Harvey v. Bridges*, 1 Ex. 262; *Burling v. Reid*, 11 Q. B. 904; *Davidson v. Wilson*, 11 Q. B. 891.

DRAPER, C. J.—As to the second count, it seems virtually to have been given up at the trial. I do not perceive that anything was left to the jury upon it, and I quite agree there was no case to leave.

As to the first count, I think there was evidence given on which the plaintiff had a right to go to the jury. There is no evidence to show that the defendant's term was a term continuing down to the committing of the trespass. It is true the plea so alleged, but the replication denies this, asserting that the term expired before the trespass. I think the defendant who justifies as a termor is bound, when the continuance of the term up to a certain period is denied, to support his plea by proving what the term was; and even if the term had not expired, the objection would not, I think, have been well founded, that the release of the rent was not under seal, though the want of a surrender by deed might have created a difficulty.

There was evidence, however, of a surrender in fact, that the defendant did go out and plaintiff did enter, and if so, I do not think the plaintiff can be turned round by the non-production or proof of a release under seal for the rent. No authority was cited going the length for which Mr. *Beard* contends, for it amounts to this, that the plaintiff could not prove that he had released and discharged the defendant

from payment of the rent in any other way than by proving a release under seal.

In my opinion, the rule to enter a non-suit must be discharged

*Per cur.*—Rule discharged.

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JARVIS V. CLARK ET AL.

*Interest—Money paid as such over 6 per cent.—How far recoverable.*

*Held* that money paid in excess of six per cent. interest upon a contract, not void by act of parliament, for the payment of such interest cannot be recovered back.

DEBT on bond to pay £1500 in ten years from the 3rd of October 1855, and to pay £180 yearly in equal quarterly payments.

*Pleas*—1. *Non est factum*. 2. Payment. 3. Set-off, claiming to recover a balance, and averring that the quarterly payments mentioned are for interest on the principal sum of £1500 at 12 per cent., and which defendants have hitherto paid, and claiming to recover the excess of 6 per cent back. 4. Accord and satisfaction.

The declaration most unnecessarily, as it would seem, assigned a breach for the non-payment of every quarterly payment accruing due from the date of the bond until the 3rd of July 1860. But at the trial plaintiff's counsel admitted that everything had been paid excepting the two quarterly payments respectively falling due on the 3rd of April and the 3d of July 1860. The execution of the bond was admitted, and the defendant put in two letters from the plaintiff shewing that the £180 per annum was in fact interest at the rate of 12 per cent. per annum on the principal debt of £1500, and contended that they were entitled to recover back the excess of interest which they had paid above six per cent., setting off enough to pay the instalments claimed, and that as plaintiff has assigned breaches for a much larger sum than was admitted to be due, and has acknowledged payment of £180 per annum up to the 3rd of January 1859, that the defendant was entitled to set off the excess.

Leave was reserved to move for a nonsuit on these objections, and the plaintiff had a verdict for the two instalments.

*Duggan*, Q. C., moved for a rule *nisi* accordingly.

DRAPER, C. J.—We have already held in this court that if money be paid as interest according to the terms of a contract not void by act of parliament, exceeding six per cent. per annum, it is not recoverable back.

The excess claimed back is of this character, and it is claimed on a plea of set-off as money had and received. Our previous determination governs this case so far; there is nothing to set-off unless we depart from that decision, for the defendant asserts it was paid as interest on a contract to pay such interest.

Then as to the two instalments, to recover which this action is really brought, there is no plea in bar of the recovery of the whole amount claimed. No plea that the quarterly payments were reserved as interest at a greater rate than six per cent., and therefore that the plaintiff can recover no more.

There is, therefore, on these pleadings and evidence no ground for a rule.

*Per cur.*—No rule.

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## ROGERS V. DICKSON.

*Reversioner—His right to maintain an action for damages to the reversion—  
Mortgage—Lease.*

*Held* that an action is maintainable by the reversioner of a mill demised to a tenant for diversion or obstruction by a stranger of water from the mill-head, the obstruction being of such a character as to render the sale of the reversion less valuable.

The mortgager of a property with a clause for the retaining possession until default (such default not having taken place) is entitled, so long as the mortgage continues in force without default, to maintain an action for an injury done to the reversion.

DECLARATION—1st count—That plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of the river Otonabee for working the same, and defendant by

throwing slabs and other timber into that stream hath and does wrongfully obstruct plaintiff in his use of the said stream for the proper working of the mill.

2nd count—That plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream called the river Otonabee for working the same; that plaintiff constructed a race-way from his dam on that stream to his mill, by which race-way so much of the water as was necessary for the mill of right did and ought to flow through the race-way to the mill; that defendant wrongfully threw into the stream above the dam and race-way slabs and other timber which sink in the stream near the mouth of the race-way, and by so sinking they prevent the water of the stream from flowing through the race-way to the mill, and thereby the defendant wrongfully hinders the plaintiff in his use and enjoyment of the stream for the purposes aforesaid.

3rd count—That divers mills with the appurtenances on the river Otonabee were respectively in the possession of certain persons as tenants to the plaintiff, the reversion thereof then and still belonging to the plaintiff, and by reason of the said mills, the tenants, and the plaintiff in respect of the reversion, were and are respectively entitled to the flow of the river for the working thereof, and for so working thereof the plaintiff, before the committing the grievances complained of, constructed a race-way from his dam on the river to the mills, and by the race-way, &c., the water ought to flow (as in second count), yet defendant, while the mills were held by the tenants, and whilst plaintiff was so interested therein, wrongfully, &c. (as in the second count), whereby plaintiff is injured in his reversionary interest of and in the mills.

*Pleas*—1st. Not guilty.

2nd. To the first and second counts, that the mills were not plaintiff's as therein alleged.

3rd. To the last count, that the reversion of the mills was not the plaintiff's as therein alleged. On which the plaintiff joined issue.

The case was tried at Peterboro' in October last before *Burns, J.* There was a good deal of evidence given, from

which it appeared that the defendant and other owners of said mills on the river Otonabee, higher up the stream than the plaintiff's mill, were in the habit of throwing into the river from their mills slabs and other refuse wood, which floated down stream when the current was strong, and on reaching the plaintiff's premises, where the dam crossed the river, sunk so as to occasion a very serious obstruction to the flow of the water into the race-way of the plaintiff's saw-mill and grist-mill. The plaintiff's witnesses represented that the larger part of this obstruction was caused by slabs coming from the defendant's mill; the marks on the timber enabled them to distinguish them, and the defendant's mill was the next above the plaintiff. One witness stated that three years before the trial the river was pretty free from slabs, and the water at the head-gate was from eight to twelve feet deep, but that now very little water gets in. Another witness swore that in former years, going back to 1854, there was always plenty of water for plaintiff's mills, twelve feet, and in one place fourteen feet, but that now there were only two feet. Several witnesses concurred in representing that the cost of removing the sunken slabs, and so of giving free passage for the water into plaintiff's mills, would be enormous.

It was admitted that on the 2nd December 1851 one Hall conveyed land on the west side of the river Otonabee to one Burnham; that on the 18th October 1854 Burnham conveyed the grist-mill, with the right to use the water, to the plaintiff; that on 13th March 1857 Burnham conveyed the land and all the water privilege to plaintiff; that on 16th March 1857 the plaintiff leased the saw-mill for ten years to one VanAlstine at a rental of £150 per annum; and that on 1st January 1856 plaintiff leased the grist-mill to Lewis Glover for five years at a rent of £400 per annum.

The plaintiff also admitted that on the 7th February 1852 Hall mortgaged the lands, or some part of them, which the plaintiff now owns, to the Trust and Loan Company of Upper Canada in fee, subject to a proviso that the same should become void on payment of £3000 on the 12th February 1857, and interest at the rate of eight per cent. per annum, to be paid half-yearly on 12th February and 12th

August in each year. The principal sum was unpaid, and the current interest from 1st October 1860.

It was further admitted that on 13th March 1857 the plaintiff mortgaged the property in question, or some part of it, to the Rev. Mark Burnham in fee, subject to a proviso that the same should become void on payment of £5000 in ten years from the date, and of interest at six per cent. per annum, half-yearly, on the 13th September and March in each year.

The first of these mortgages did not cover the mills, but did cover the pond and the place where the accumulation of slabs took place above the plaintiff's head-gate. The second mortgage covered the mills.

At the close of the plaintiff's case it was objected for the defendant that the plaintiff could not recover in the face of these outstanding mortgages. The learned judge ruled that neither mortgage interfered with the plaintiff's right of action on the third count, but that the leases prevented his recovery on either the first or second counts.

The defendant's evidence bore upon two points—1st, that the washing away of the bank of the river above the plaintiff's mill had caused the water to become shallower; and 2nd, that a channel might be cut so as to let the water into plaintiff's head-gate, and so remove the injury which the sinking of the slabs had caused at a much less expense than the plaintiff's witnesses represented would be necessary to remove the whole accumulation.

The learned judge left it to the jury to say whether the defendant's wrongful act in throwing slabs into the river caused any obstruction and injury to the plaintiff's mills.

2nd. Whether the obstruction was of a permanent character so as to injure the plaintiff after the expiration of the leases he had granted. That the plaintiff must recover once for all, and for a damage distinct from that inflicted upon the tenants.

The jury found for plaintiff on the third count, damages £300, and for the defendant on the first and second counts.

In Michaelmas Term *D. B. Read*, Q. C., obtained a rule

*nisi* for a new trial, the verdict being against law and evidence, and for the rejection of evidence, and for excessive damages, and that the reversion was not in the plaintiff, but in the mortgagees; that no injury to the reversion was proved—no injury of a permanent character, but one capable of being immediately removed.

*A. Crooks* shewed cause.

DRAPER, C. J.—There can be no doubt that an action is maintainable by the reversioner of a mill demised to a tenant (vide Addison on Torts 64), for diversion or obstruction, which is in effect a diversion by a stranger of water from the millhead, for if the diversion or obstruction was allowed to continue with the knowledge of the reversioner, and without interruption from him or his tenant, it might eventually be made the foundation of a legal right to divert or obstruct the water to the serious injury of the inheritance.

This appears to me to be an obstruction of a permanent character—one which will remain unless something is done to remedy the evil. See *Simpson v. Savage*, 1 C. B. N. S. 347; *Metropolitan Association v. Petch*, 5 C. B. N. S. 504. And although the evil might be remedied before the end of the term granted of the lease of the saw-mill, which is stated on the learned judge's notes to be on the 16th March 1867, yet as to the grist-mill the term ends on the 1st January next, leaving no time sufficient for the entire removal of the obstruction, if there is enough to permit of such a change as would admit the water more freely into the plaintiff's race-way, and with such an obstruction existing the plaintiff's interest is certainly less valuable and less saleable, which would enable him to maintain this action. *Jesser v. Gifford*, 4 Burr. 2141.

So far as the character of the obstruction is concerned, I think the action well brought by the reversioner, and that it is sustained by the evidence.

But it is objected that the plaintiff is not reversioner so as to entitle him to maintain this action.

He had, before granting the mortgage to Mark Burnham, granted a lease of the grist-mill, which expires on 1st January

next. This mortgage was therefore subject to this lease. It contains a proviso that until default the mortgagor should hold possession and receive the rents and profits. See *Walmsley v. Milne*, 6 Jur. N. S. 125. This, I apprehend, amounts to a re-demise of the premises of ten years, subject to forfeiture for non-payment of the half-yearly interest. The plaintiff, therefore, notwithstanding the mortgage, appears to have a reversion in the grist-mill for years, which will entitle him to possession on 1st January next, for no default in this mortgage is suggested.

The mortgage to the Trust and Loan Company appears to be in default, for the principal sum became due on the 12th February 1857, on which day the mortgagees were entitled to enter. It is on the property covered by this mortgage, as I gather from the evidence, that the slabs which cause the obstruction have sunk in the mill-pond, preventing the flow of water to the mills.

The saw-mill was leased after the date of mortgage to Burnham, which covers both mills, and the term does not expire until after the principal sum mentioned in the mortgage will become due. If the mortgage has operated to convey the plaintiff's whole estate to the mortgagee, then the re-demise for ten years will not, so far as I can see, make the plaintiff a reversioner, for that term will expire before the end of the term granted to the tenant of the saw-mill.

So far as any analogy can be drawn from the case of trustee and *cestuique* trust, the case of *Vallance v. Savage*, 7 Bing. 595, is unfavourable to the plaintiff's right as a mortgagor, for there the court held that the trustee was the proper person to bring an action as reversioner, although the tenant had taken a lease from, and paid rent to, the *cestuique* trust.

*Mumford v. The Oxford, &c., Railway Co.*, 1 H. & N. 34, is very like the present case. The plaintiffs were the owners of the equity of redemption, the legal estate being vested in a mortgagee, and they brought the action for an injury to their reversionary interest.

*Bramwell*, B., told the jury that the plaintiffs being merely the owners of the equity of redemption, had no such reversion as would entitle them to maintain this action. He also

directed against the plaintiff, because the evidence shewed no injury to the reversion. Against the latter direction the plaintiff's counsel moved, but no notice was taken of the other part of the learned Baron's ruling. The court refused a rule *nisi*.

Turner v. Cameron's Coalbrook Steam Coal Company, 5 Exch. 932, and Litchfield v. Ready, *ib.* 939, only prove that a mortgagee cannot maintain trespass until he has entered or recovered judgment in ejectment; but trespass is an action founded on possession.

In Trent v. Hunt, 9 Exch. 14 (see also Jolly v. Arbuthnott, 5 Jur. N. S., 689), *Alderson*, B., who gave the judgment, says—"Here a man has demised to a tenant at a rent, and then has mortgaged his reversion in the usual manner. It is perfectly clear that the operation of the mortgage is here to transfer to the mortgagee the reversion expectant upon the term demised, and with it the rent, and that the mortgagee is the true owner in law of the reversion and all its incidents."

*Mr. Crooks* argued that the mortgage to Burnham might be looked upon, as it would be in a court of equity, as a mere security for the money, and something collateral to the title, which a stranger could not set up against the mortgagor. I cannot agree with him. The mortgage conveys the legal estate with all its incidents, including the right of possession, unless there be, as there usually is, a reservation in this respect, and I do not see how in a court of law we can treat the mortgagor as the true legal owner any more than we can the *cestuique* trust.

Again, in Hitchman v. Walton, 4 M. & W. 409 (see also Watson v. Lane, 11 Exch. 769), it was held that a mortgagee who has allowed the mortgagor to remain in possession after default may sue as a reversioner. We acted on this principle in McLeod v. Mercer, 6 U. C. C. P. 197.

On the whole, if it were not for the state of facts as regards the grist-mill, I should think the plaintiff could not maintain this action; and as to that he can only, while the mortgage exists and he makes no default, set up a claim as reversioner. The mortgagee would, but for the re-demise, be

the only person, as appears to me, who could maintain this action. The damages given are therefore founded on an assumption that the plaintiff had a larger right than the evidence and the law, as I understand it, gives him, and on this ground I think there must be a new trial.

Nor am I free from doubt as to the direction of the learned judge that this recovery must be once for all damages which the defendant's wrongful act has caused. *Bowyer v. Cook*, 4 C. B. 236, decided that though a plaintiff had recovered damages against defendant for placing stakes and stumps on his land, he might bring a new action of trespass against him if he did not remove them after notice. And many cases were there cited to the same effect, in which as here the wrong is done upon the plaintiff's own land. It might be treated as if the defendant claimed a right to let his slabs, &c., continue on plaintiff's land. *Battishill v. Reed*, 18 C. B. 696, affirms the same doctrine, the difference, however, being that the nuisance complained of was under the entire control of the defendant; but the judgment tends to shew that successive actions might be sustained, and the plaintiff there was a reversioner.

I think there should be a new trial—costs to abide the event.

*Per cur.*—Rule absolute.

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### ROE V. SOUTHARD.

*Lease—Covenant to build—Breach of—Waiver of breach.*

An indenture of lease was entered into between plaintiff and defendant, *habendum* for 21 years, with a covenant by the lessee (defendant) to erect within four years a house, &c., which covenant was broken before the commencement of this suit. The lessor received rent to a period subsequent to the time of the alleged forfeiture.

*Held* to be a waiver of the right of entry for breach of the covenant to build.

This was an action of ejectment brought to recover possession of lot 94, 1st con. east of Yonge street, in Whitechurch, registered as lot No. 3 in Main street, Newmarket demised for 21 years from 1st of April 1854.

The action was brought for a breach of the following co-

tenant by the defendant:—"That he, the said party of the second part, his heirs, executors, administrators, or assigns, or some of them, shall and will, within the first four years of the term hereby granted, at his own proper cost and charges, erect, build, and finish in a tenantable manner, a good and substantial building for a store or dwelling-house in the usual manner, not less in size than twenty-four feet front, the roof of which must face the said street and be at least two stories high, and that all barns and stables shall be erected east of said lane, and permit the said party of the first part, his heirs and assigns, to deposit the contents of any tail race in the west bank of said creek, if he, the said party of the second part, his heirs, executors, administrators, or assigns shall not, within the said first twenty-one years of the term hereby granted, purchase the fee-simple of the hereby demised land and premises in manner as hereinafter specified."

The execution of the lease, and that the house was not built before the commencement of suit, was admitted.

Defendant contended in effect that the forfeiture only arose in the event of defendant not purchasing within 21 years.

Plaintiff admitted having received rent of the premises to a period subsequent to the bringing of this action.

Defendant further objected that the plaintiff could not recover under the notice of claims, as he claimed under the power of sale in the lease and not under the power of entry.

Verdict for the plaintiff, subject to the opinion of the court on the point raised    Damages 1s.

*Connor*, Q. C., for plaintiff.

*McMichael*, for defendant, cited *Dendy v. Nicholl*, 4 C. B. N. S., 376.

DRAPER, C. J.—We need not trouble ourselves to consider Mr. *McMichael's* point, that although there was no house built within the last four years, yet the right to purchase continuing for twenty-one years, the term must also continue so long. For the acceptance of rent up to a time subsequent to the bringing this action, and for a period for

which the plaintiff could not claim rent, unless the term continued after the time of the alleged forfeiture, is a clear waiver of the right to enter arising from the not building the house. The case of *Dendy v. Nicholl*, 4 C. B. N. S. 376, seems conclusive against the plaintiff's claim.

*Postea* to the defendant.

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KELLY v. McDERMOTT.

*Foreign judgment—Allegation of—Pleading.*

A declaration on a foreign judgment, alleging the recovery of £20, 13s. 8d. debt and £38, 1s. 2d. costs, amounting in all to £58, 17s. sterling, or \$286, 31c. lawful money of Canada; that the court was a superior court of record, and that the judgment was in full force and unpaid,

*Held* to disclose a sufficient cause of action, and not to be open to the objection taken in *Place v. Potts*, 8 Exc. 704.

The declaration stated that on the 5th of November 1853 plaintiff recovered a judgment against defendant in the Court of Common Pleas in Ireland for £20, 13s. 8d. debt, 1s. for detention of debt, and £38, 1s. 2d. costs—in all £58, 17s. sterling.

That said court was a superior court of record, that judgment is in full force, and plaintiff had not obtained any satisfaction or execution, and defendant hath not paid.

2nd count—That on the 9th July 1853 a final decree was made in the Court of Chancery in Ireland in a suit in which defendant was petitioner and plaintiff was respondent, dismissing defendant's petition with costs, to be paid by the now defendant to plaintiff; that said costs were finally taxed at £35, 13s. 1d. sterling, and that said amount has not been paid.

3rd count—Common count for interest.

Demurrer to 1st and 2nd counts—That the said counts do not shew any indebtedness from the defendant to the plaintiff, and contain no allegation of any indebtedness or right of action.

*Hector Cameron*, for defendant, in support of the demurrer, contended that a foreign judgment requires further allegations than one of our own, citing *Place v. Potts*, 8 Ex. 705; *Wilkinson v. Sharland*, 10 Ex. 724.

*Richards*, Q. C., contra, cited *Sheehy v. The Professional Life Assurance Co.*, 2 C. B. N. S. 211; *Henderson v. Henderson*, 6 Q. B. 288; *Fagg v. Nudd*, 3 E. & B. 650; *Goldham v. Edwards*, 17 Com. B. 141.

DRAPER, C. J.—As to the first count, it is not open to the objection suggested in *Place v. Potts*, for a debt *in presenti* is shewn in the count. It says expressly that plaintiff by the consideration, &c., recovered a certain debt of, &c., and the sum of, &c., for his costs, and avers the amount of the same so recovered in sterling money to be a certain sum in our currency.

There was no substantial distinction whatever under the old form of pleading, between the declaration in debt on a judgment of one of the superior courts in England and debt on a foreign judgment brought in one of those courts. The introductory form has been rendered unnecessary by the C. L. P. Act, and the amount claimed by the plaintiff may be as well put in the aggregate once for all as stated at the end of each count, and put together also in the aggregate at the end of the declaration.

The same reasons apply to the second count, the objections to which were the same as to the first, and *Henderson v. Henderson*, 6 Q. B. 288, shews that debt is maintainable for money decreed to be paid by a foreign equitable jurisdiction.

We think there should be judgment for the plaintiff.

*Per cur.*—Judgment for plaintiff.

## COUCH V. CRAWFORD.

*Rent—Distress for—Seizure of Property temporarily on Premises.*

*Held* that a pair of horses belonging to a stranger, which were driven on to premises and tied, the party in whose charge they were going into the house, were not seizable for rent if they were in actual use at the time of the distress.

The facts of this case sufficiently appear in the judgment of the court, which was delivered upon a motion by *Cameron*,

Q. C., for a rule *nisi* for a new trial on the law, evidence, and judge's charge.

DRAPER, C. J.—We are all of opinion the verdict must stand.

The defendant applies for a new trial on the ground of misdirection.

The question was, whether a pair of horses which were distrained upon by defendant for rent of premises occupied by one Welch as tenant to defendant, and which plaintiff insisted were his property, were liable to distress.

For the purpose of this question we assume, upon the finding of the jury, that the horses were the plaintiff's property. They were seized upon the premises of defendant in Welch's occupation, and rent was due. According to the testimony given on this trial, they were brought there for some unexplained purpose by Welch's son, who drove them, harnessed to a waggon, on to the demised premises, fastened them to a post and went into the house. In about ten minutes they were seized on the distress warrant. (On a former trial the time was stated to have been longer.) It was in October 1858, about 7 or 8 o'clock in the evening, and the place of seizure was about 5 miles from plaintiff's house.

The learned judge (*Burns*, J.) left to the jury to say whether the horses were in actual use at the time of seizure or not. He was asked to define "actual use" as a question of law, but did not, leaving it to the jury as a question of fact. This is the misdirection complained of.

I continue of the same opinion as I expressed when the new trial was granted, namely, that the horses were liable to be distrained unless that could not be done without producing or at least risking a breach of the peace. And I think I should have left the case to the jury on the question of actual use with that explanation. The question of the plaintiff's property in the horses was left expressly to them, and they were asked to say whether defendant procured the horses to be brought there in order that they might be seized for his rent. It does not appear how they found upon this question.

I should have had some difficulty in saying that a further explanation of the law of distress than appears on the learned judge's notes ought not to have been submitted to the jury. The mere asking whether the things were in actual use would hardly present the true question to the jury, but the learned judge informs us on reference to him that the question of the danger of the breach of the peace was submitted with illustrative observations, as directly bearing on the question of "*actual use*," which was thus left to the determination of the jury.

Under these circumstances we are all of opinion there should be no rule.

*Per cur.*—No rule.

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FERGUSON ET AL. V. BAIRD ET AL.

*Cognovit—Judgment on—Application to set Aside—Consol. Stat. U. C., ch. 26, sec. 17.*

Plaintiffs having entered judgment on a cognovit given by defendants, issued execution and seized the goods of defendants A. W., and H. & Co. having also recovered judgments and placed executions in the sheriff's hands, make this application to set aside the execution of plaintiffs, or to place the same subsequent to their execution on the ground that the cognovit on which the judgment was founded was void as against creditors, under ch. 26, Consol. Stat. U. C., sec. 17.

*Held* that the Court ought not to interfere, but leave the parties to enforce their respective claims against the sheriff.

In Trinity Term *Helliwell* obtained a *rule nisi* calling on the plaintiffs to shew cause why the judgment entered and the confession of judgment on which it was founded should not be set aside with costs, or why the execution with all proceedings thereunder should not be set aside with costs, or why the execution should not be postponed as to the satisfaction thereof till after the satisfaction of an execution of Andrew Watrous against the defendants, and of another execution of Thomas Hunton and William Hunton against the defendants, on the ground that the confession of judgment was void against creditors of defendants, and is invalid and ineffectual to support the judgment and execution in this cause under the 17th section of the Judgment Debtor's Act.

The 17th section of ch. 26, Consol. Stat., U. C., enacts

that in case any person being at the time in insolvent circumstances or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, voluntarily or by collusion with a creditor or creditors gives a confession of judgment, *cognovit actionem*, or warrant of attorney to confess judgment to defeat or delay his creditors wholly or in part, or with intent thereby to give one or more of the creditors of such person a preference over his other creditors, or over any one or more of such creditors, every such confession, *cognovit actionem*, or warrant of attorney to confess judgment shall be deemed and taken to be null and void as against the creditors of the party giving the same, and shall be invalid and ineffectual to support any judgment or writ of execution.

The affidavits in support of the application stated that a confession of judgment dated the 30th of May 1860 was given by defendants to plaintiffs in this cause, and judgment was entered thereon on the same day for £155, 16s. 9d., and a *fi. fa.* was issued and delivered to the sheriff on the 31st of May 1860, endorsed to levy £75, 18s. 5d. debt, &c., &c. That a confession of judgment dated the 29th of May 1860 was also given by defendant to John McGee, entitled in the Queen's Bench for £260, and judgment was entered thereon on the 30th of May 1860, on which day a *fi. fa.* was issued out of the Common Pleas and delivered to the sheriff, endorsed to levy £129, 3s. 2d. debt, &c., &c. (It appeared that the judgment was in the Queen's Bench, but the *fi. fa.* was erroneously issued from the Common Pleas, the proceedings being in the deputy's office in Carleton.) That on the 13th of April 1860 a suit was commenced by writ of summons in the county court of Carleton by Thomas Hunton and William Hunton against defendants on a promissory note, in which defendants pleaded payment, and a verdict was rendered (no defence being made) against them on the 12th of June 1860 for £39, 13s. 10d., on which judgment has been entered for £47, 13s. 6d., and execution thereon issued and delivered on the same day to the sheriff. That a few days after the service of this writ of summons the defendant Baird wished to obtain an extension of time,

and held out to Hunttons' attorney a threat that if they pursued their claim to execution they (defendants) would take such steps as would prevent the Hunttons from collecting any part of the claim. Two other similar subsequent conversations were spoken of. Hunttons' attorney then spoke to Baird respecting the confessions of judgment to the now plaintiff and to McGee, and Baird answered that as they had not sued the defendants they had better right to be paid than the Hunttons, and he (Baird) would do all he could to give them all he had rather than that the Hunttons should get anything. That after the Hunttons' *fi. fa.* was placed in the sheriff's hands two other writs against defendants' goods were placed in the sheriff's hands, one endorsed to levy £68, 15s. 10d., and the other \$142.50. The affidavits contained statements strongly tending to shew that the defendants, at the time of giving the confessions of judgment to this plaintiff and to McGee, were in insolvent circumstances, and unable to pay their debts in full, and Thomas Hunton swore that he verily believed that the defendants voluntarily gave the confession of judgment to the plaintiffs with intent and design to defeat and delay him and his co-plaintiff William Hunton from obtaining payment of their claim against defendants, and with intent and design to give the plaintiff a preference over the Hunttons.

On the 14th of June 1860 notice was given to the sheriff to sell the goods of defendants (which were in his hands seised on the *fi. fa.* in this cause on the Hunttons' writ), and that an application would be made to set aside plaintiffs' confession, &c., and on the 16th June notice was given to the sheriff not to pay over the proceeds of the sale until the result of such application should be known.

Affidavits to a similar effect were made, stating a suit brought in the county court of Carleton by Andrew Watrous against the defendants, in which judgment had been recovered and an execution placed in the sheriff's hands.

Cause was shewn in Michaelmas Term by *C. S. Patterson*. He filed an affidavit of James Baird, one of the defendants,

stating that at the commencement of this suit they were justly indebted to the plaintiffs in £75, 18s. 5d. That the confession was not given voluntarily or by collusion with the plaintiffs or any other creditor or creditors of defendants, nor with intent to defeat or delay any such creditor in whole or in part, but only for the purpose of securing the plaintiffs the payment of a debt justly due them, and to save the costs of an action. That at the time of giving the confession the defendants were not in insolvent circumstances, nor did they know or believe themselves to be on the eve of insolvency. The deponent gave a statement of their assets and debts, shewing that they could pay 20s. in the pound. And he swore that he verily believed that if the Hunttons' suit had not been pressed they could have obtained time from their other creditors, and would have been able to pay all their debts in full. He cited *McMaster v. Clare*, 7 G. Ch. R. 550; *Loader v. Hiscock*, 1 Fos. & Fin. 132.

*Helliwell*, in support of his rule, referred to *Armour v. Carruthers*, U. C. Pr. R. 217; *Young v. Christie*, 7 G. Ch. Rep. 312; *Imray v. Magnay*, 11 M. & W. 267.

DRAPER, C. J.—I doubt if in any case we ought summarily to set aside a regular judgment which as between the parties to it is unimpeachable. The only ground of application is, that this judgment is void as against parties who have obtained a judgment against the same defendants at a later date. But this rule has the alternative of postponing the satisfaction of the plaintiffs' execution until the execution issued by the applicants is satisfied. The goods, or rather money, the proceeds of the goods of the defendants, are in the hands of the sheriff, the sale having, as I understand, been made under the plaintiffs' execution.

The case presents a dispute between two execution creditors, each having a just claim as against the defendants. The plaintiffs claim because they have the first judgment and the first execution. The applicants insist that the plaintiffs' judgment is founded upon a confession which is

null and void as against them, and which therefore cannot support the judgment and execution on which the plaintiffs rely. And they have given notice of their claim to the sheriff; by one notice as to the goods served on the 14th of June last, and by another as to the money served on the 16th.

This, then, is a claim to goods, or proceeds of goods, taken in execution under a process issued out of this court by persons other than those against whose goods the execution issued.

If the sheriff pays the proceeds over to the plaintiffs, leaving nothing or not enough to satisfy the claimants, and makes his return accordingly, he may be sued for a false return, on the ground that the confession of judgment is null and void. If he satisfies the claimants' execution, thereby leaving nothing or not enough for the plaintiffs, he will then be subject to an action by them.

In principle I perceive no difference between the sheriff's position in this case and the position he would be in if after the seizure under the plaintiffs' writ the applicants had given him notice that they claimed the goods under a chattel mortgage or a bill of sale. He could not tell then, any more than he can tell now, whether the claim was well or ill founded, and his only escape from the dilemma would be under the interpleader act. I do not see that he has any other relief now, and I do not apprehend the cases of *Salmon v. James* (1 Dowl. 369) or *Day v. Waldock* (1 Dowl. 523) will be found to govern this case.

But if he is not entitled to this relief, it does not follow that the present application should be granted. The applicants may enforce their claim, if well founded, against him, and should, in my opinion, be left to that course where the facts on which they rely are denied in express terms on oath. It is not necessary to decide that the court would under no circumstances entertain such an application, or give the relief prayed for on motion, but they cannot be called upon to decide which of two conflicting statements is true, nor should they in a doubtful case withdraw from a jury the determination of a question peculiarly fit for the

decision of that body, namely, a question of matters of fact involving the existence of fraud.

*Per cur.*—Rule discharged.

See *Imray v. Magnay*, 11 M. & W. 267; *Christopherson v. Burton*, 3 Exch. 160; *Shattock v. Carden*, 6 Exch. 725; *Remmett v. Lawrence*, 15 Q. B. 1004; *Harrod v. Benton*, 8 B. & C. 217; *Barber v. Mitchell*, 2 Dowl. 574.

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### WILLSON ET AL. V. THE CORPORATION OF THE UNITED COUNTIES OF HURON AND BRUCE.

*Contract—Acceptance by engineer of work under—Principal bound by.*

Plaintiffs having contracted with defendants to perform certain works to be paid for monthly in debentures made by defendants, on the estimate of their engineer, payments to be made by orders on the debentures or proceeds thereof to be deposited in the hands of B. F. & Co., London, England.

The third breach of the declaration being that though plaintiffs completed their work, and the defendants delivered to the plaintiffs orders to the amount of the certificates of the engineer, &c., upon B. F. & Co., in whose hands defendants alleged the debentures had been deposited; yet the defendants did not deliver, &c., but B. F. & Co. being their agents, wrongfully refused for an unreasonable time to deliver the debentures or proceeds, &c.

*Held*, 1st. That plaintiffs were not obliged to notify the defendants of the completion of the work and acceptance thereof by the engineer of defendants, he being their own servant whom they had authorised to accept the work, and by whose act they were therefore bound.

2nd. That on completion of the work and acceptance by the engineer of defendants, the payment therefore became immediately due on request, and no demand was necessary.

3rd. That B. F. & Co. were the agents of both plaintiffs and defendants, and that neither party were liable to the other for their (B. F. & Co.'s) acts, as being *tortious*.

The declaration set out articles of agreement made 24th September 1857, whereby plaintiffs agreed to construct certain gravel roads for defendants, and defendants covenanted to pay plaintiffs £800 per mile in municipal debentures duly made by defendants, to be taken at par, payments to be made monthly on the estimate of defendants' engineer. Ten per cent. to be retained by defendants until the final completion of the work. Monthly payments to be made by orders on the debentures or the proceeds thereof that were then or should thereafter be deposited for sale in the hands of parties in London, England. Averment of plaintiffs' performance.

1st. First breach—That defendants, though requested, did not pay to plaintiffs the sum of £800 per mile in municipal debentures duly made by defendants, less the 10 per cent.

2nd. Nor did defendants, though requested, deliver, or cause to be delivered, to plaintiffs orders on such debentures or the proceeds thereof in the hands of any parties in London.

3rd. And although plaintiffs constructed said roads, being 100 miles, and defendants' engineer accepted the same, and certified monthly the amount to which plaintiffs were entitled, and though defendants delivered to plaintiffs orders for the amount of such certificates, less ten per cent., upon Bosanquet, Franks, & Co., London, England, in whose hands defendants alleged the debentures had been deposited, yet defendants did not deliver, or cause, &c., to plaintiffs from time to time debentures, but Bosanquet, Franks, & Co., being the agents of the defendants to whom the said orders were addressed by defendants, wrongfully and improperly refused for an unreasonable time to deliver to plaintiffs any debentures, or the proceeds of any, though requested by plaintiffs.

4th. And although defendants did, after unreasonable delay, deliver to plaintiffs certain debentures made by defendants, yet such debentures were invalid and illegal, and were not duly made by defendants in accordance with the statutes in that behalf.

Special damage averred.

Second count set out similar contracts.

*Averment*—That everything had been performed by plaintiffs, and had happened to entitle them to claim. Breach—That defendants have not paid to plaintiffs £800 per mile, according to the agreement, in municipal debentures, nor have they delivered to plaintiffs the said debentures, nor in any way paid to plaintiffs the amounts due to them.

Common counts:—

*Pleas*—1. *Non est factum*.

2nd. Payment.

3rd. As to so much of the first count as alleges that defendants were to pay plaintiffs £800 per mile in municipal debentures, duly made, and the alleged breach thereof, de-

defendants say that the articles of agreement provide as to such payment as follows:—"That the council and their successors in office shall and will, for doing and performing the work as aforesaid, pay, or cause to be paid, to the said contractors (the plaintiffs), their executors or administrators, £800 cy. per mile, in municipal debentures of said united counties, said debentures to be taken at par, the payments to be made monthly on the estimate of the engineer of the said united counties; and for the better security of the due fulfilment of the said contract, ten per cent. of said debentures will be retained by said council until the final completion of the said work," and defendants say they did pay to plaintiffs the sum of £800 per mile, in municipal debentures of the united counties, monthly, on the estimate of the engineer, less ten per cent.

4th plea to second breach of 1st count—That defendants did deliver to plaintiffs orders for said debentures, or for the proceeds thereof, in the hands of Bosanquet, Franks, & Co., in London, in whose hands the debentures had been lodged at the request of plaintiffs.

5th plea to the first breach on the first count, and to the second and third counts, set-off.

6th plea to first and second breaches of the first count, and to all the second count, excepting the sum of \$6946  $\frac{90}{100}$ , that they paid defendants in municipal debentures, and by order on municipal debentures, the whole amount of their claim in this plea mentioned, except \$6946  $\frac{90}{100}$ .

7th plea to first and second breaches of first count—That all plaintiffs claim has been paid in municipal debentures, except \$6246  $\frac{90}{100}$ , which sum is part of the ten per cent. which defendants were entitled to retain until the final completion of the work, and that they have always been and still are ready to pay the same, but plaintiffs did not notify defendants of the completion of the work, or of the acceptance thereof by the engineer, or demand such payment.

8th plea to the third breach of the first count—That it is provided in the articles of agreement as follows:—"It being understood that as the debentures are sent to London, England, for sale, for the benefit and convenience of the con-

tractors, that they on their part shall bear any expenses and discount attending the negotiation and sale of said debentures, and run all risks connected with the sale of the same," and defendants say that the debentures were deposited in the hands of Bosanquet, Franks, & Co., at the request of the plaintiffs, and that defendants did not refuse and neglect to deliver the debentures in manner and form as alleged.

9th plea to so much of the 3rd breach as alleged that Bosanquet, Franks, & Co. were the agents of defendants—That Bosanquet, Franks, & Co. were the agents of the plaintiffs as well as of the defendants, and not of the defendants alone.

10th to fourth breach—That the debentures were not illegal and invalid.

11th plea to fourth breach—That plaintiffs had full notice of the making and issuing the debentures by defendants, and plaintiffs required defendants to deposit the same with Bosanquet, Franks, & Co.

12th to the second count—Did not promise.

13th to second count—Payment of £800 according to the agreement.

14th to third count—Never indebted.

Defendants also demurred to the third breach—That it was not defendants' duty to deliver the debentures otherwise than by giving orders on them or the proceeds thereof that were deposited in the hands of the parties in London; that the refusal of Bosanquet, Franks, & Co. gives no cause of action against defendants; that such refusal was, as appears, a mere wrongful and improper act, against which defendants gave no guaranty. Defendants also demurred to the fourth breach—That it should have been set forth how and in what respect the debentures were illegal and invalid; that the court might judge or the jury try the facts constituting such alleged illegality; also should have shewn in what respect the debentures were not according to the statute. It was not shewn that the defendants were to guarantee the plaintiffs that the debentures were legal and valid, nor that defendants are responsible for the alleged illegality and invalidity.

The plaintiffs took issue on all the pleas, and demurred to the seventh—That the plea admitted the cause of action, and that plaintiffs were not bound to notify defendants of the completion of the work, or of the acceptance thereof by the engineer, nor to demand payment.

*Demurrer* to ninth plea—That it was no answer to that part of the declaration which it professed to answer.

*Demurrer* to the eleventh plea—That it shewed no defence, and did not allege that plaintiffs accepted the debentures in satisfaction of the debentures to be delivered under the agreement or in satisfaction of defendants' covenant, nor did it allege that plaintiffs at the time mentioned had notice of the illegality of the debentures.

*J. H. Cameron*, Q. C., and *Richards*, Q. C., for plaintiff, argued that there were but three breaches. The defendants had improperly divided the first into two, therefore the pleas to the fourth breach—the tenth and eleventh pleas—were not pleaded to any part of the declaration, and the eighth and ninth pleas, which are pleaded to the third, the last breach, do not answer it. They cited *Beaver v. Mayor of Manchester*, 8 E. & B. 44; *Flight v. Buckeridge*, 3 Bing. 216.

*Adam Wilson*, Q. C., for demurrer, cited *Thurnell v. Balbirnie*, 2 M. & W. 786; *Brogden v. Marriott*, 2 Bing. N. C. 473; *Cooper v. Slade*, 4 Jur. N. S. 791; *Brown v. Copely*, 7 M. & G. 558; *Freeman v. Rosher*, 13 Q. B. 780; *Coleman v. Riches*, 16 C. B. 104; *Chit. on Pl.* 6th ed. vol. i., 540; 7th ed. 542; *Ashby v. Harris*, 2 M. & W. 673.

DRAPER, C. J.—There may be an inconsistency, more apparent however than real, in the statement of the contract in the declaration, but I think, taking it all together, there is no difficulty in arriving at the meaning.

The general stipulation on defendants' part is, that they shall pay £800 per mile in their own debentures. This is explained or qualified by what follows—that such *payment* shall be made by orders on (I read this *against*) the deben-

tures, or the proceeds thereof, at that time, or thereafter to be deposited for sale in the hands of parties in England, for the purpose of *meeting the payments* required by the contract. The meaning I take to be, that defendants should give the plaintiffs orders for debentures, or for the proceeds of debentures, if they had been sold—that is, that for each mile finished during the preceding month, certified by the engineer, the plaintiffs should have orders entitling them to obtain debentures on the face of them worth £800 cy., or to receive the sum of money which debentures of that nominal value had produced by sale in the English market. The delivery of such orders was according to this agreement a payment in debentures.

It is quite possible that the plaintiffs by simply denying that the defendants had paid in debentures would have covered the whole question. I think they would, but they have not only done this, but have also denied a delivery of orders on the debentures or the proceeds, as if they considered that a payment by defendants of their debentures in this country would have as well fulfilled the defendants' undertaking as a delivery of orders. But certainly those would be distinct acts, and if so, the not doing both or either must be distinct breaches, and I think that the plaintiffs ought not to be heard to complain that the complaint is met in the double form in which they have put it. There are either two breaches or one breach stated in two distinct forms. But the contention is of little value; an amendment would have been allowed during the argument, and the argument in effect proceeded as if the objection had been waived or the amendment made.

I think the seventh plea bad. The contract points out how it is to be ascertained and determined that plaintiffs have a right to be paid, namely, monthly by the estimate of, and finally by the acceptance of the defendants' engineers. When, therefore, the declaration avers that the plaintiffs did finish the work to the acceptance of, the defendants' engineer, it states a fact which I take to be equally in the knowledge of both parties, for the defendants must be deemed cognizant of the acts of their own officer or agent,

whom they had authorised to accept, and by whose acceptance they were bound. They admit the acceptance, and cannot be heard to deny the inference that they knew it, for their agent did it, and the moment the engineer has accepted, the right to be paid accrued completely to the plaintiffs. It became a debt payable on request, and no demand was necessary. 1 Saund. 33 *a*.

The ninth plea is, in my opinion, a good answer to that part of the third breach to which it is pleaded, namely, the wrongful and improper withholding from the plaintiffs by Bosanquet, Franks & Co. of debentures or proceeds thereof for which defendants had given plaintiffs orders. The liability of defendants for this alleged wrong is founded on Bosanquet, Franks & Co. being their agents for that business; but if they were equally the agents of the plaintiffs for these transactions—and so the plea affirms—then the foundation of the defendants' liability is destroyed. The acts of the agents are said to be under an authority derived from both parties. If this be true, one of the parties cannot be answerable to the other for those acts as being tortious, though B. F. & Co. may.

The eleventh plea is pleaded to the fourth breach, which asserts that the debentures delivered to plaintiffs were invalid and illegal, and not duly made by defendants. It sets up that plaintiffs had full knowledge and notice of the making and issuing of the debentures by defendants, and required defendants to deposit them with Bosanquet, Franks & Co. This certainly is no answer. The plea does not assert, if that would have helped, that the plaintiffs had knowledge that the debentures made and issued were not duly made, and were invalid and illegal, and the knowledge of the fact of issuing and making does not involve this other knowledge. The plea is a confession without being an avoidance.

As to the demurrer to the third breach—I have doubted, considering how the contract is stated in the declaration, whether the defendants might pay in their own debentures without sending them to England. Upon the face of the declaration the defendants have a right to make monthly payments by giving orders on Bosanquet, Franks & Co., and

this breach admits they did give such orders, and that debentures were in the hands of that firm, and charged the non-delivery as a wrongful and improper refusal by Bosanquet, Franks & Co., then being the agents of the defendants. I do not see what ground that affords for holding the defendants liable, unless we hold that this is an averment of neglect and refusal by themselves through their agents, and treat the wrongful act of the agents as a non-delivery within a reasonable time of debentures by the defendants.

I have had great difficulty in bringing myself to this conclusion, which, however, my brothers both adopt, and consider the breach well laid, and though not entirely free from doubt, I concur with them in so holding.

The fourth breach is also demurred to, but it appears to me to be sufficient. It in effect admits that the defendants have delivered to the plaintiffs certain debentures as payment in performance of their contract, but it charges that such debentures were illegal and invalid, and were not *duly made* by the defendants. This last statement is a denial of performance by defendants in the very words of their agreement, and is explanatory of the previous words "illegal and invalid." So the breach appears to be in the words of the covenant, and the subject, the duly making the debentures, lies peculiarly in the knowledge of the defendants themselves.

In my opinion, the plaintiffs should have judgment on the demurrers to the seventh and eleventh pleas, and to the third and fourth breaches, and the defendants on the demurrer to the ninth plea.

*Per cur.*—Judgment accordingly.

See Thunnell v. Balbirnie, 2 M. & W. 786; Brown v. Copley, 7 M. & G. 558; Brogden v. Marriott, 2 Bing. N. C. 473; Cooper v. Slade, 4 Jur. N. C. 791; Freeman v. Rosher, 13 Q. B. 780; Coleman v. Riches, 16 C. B. 104; Williams v. Wilson, 9 Ex. 90; Ashby v. Harris 2 M. & W. 673; Beaver v. Mayor, &c., of Manchester, 8 E. & B. 44; Chollett v. Hoffmann, 3 Jur. N. S. 935; Com. Dig. Pl. ch. 45; Bac. Ab. Pleading.

## FRASER ET AL. V. ARMSTRONG.

*Promissory note—Mortgage as collateral authority thereto—Merger.*

H. & Co. holding several promissory notes of F., all being overdue except one, take a mortgage as security for the total amount thereof.

*Held* that on the mortgage being given and received, the remedy on the notes was extinguished by the merger of the lesser security in the higher.

DECLARATION.—First count, on a promissory note dated the 10th of October 1856, made by the defendant payable to Hutchison & Co., or order, for £306, 1s, 3d. at four months, endorsed by Hutchison & Co. to plaintiffs.

2nd count, on a promissory note dated the 13th of Oct. 1856, made by defendant payable to Hutchison & Co., or order, for £228, 18s. 7d., at six months, and endorsed by Hutchison & Co. to plaintiffs.

3rd count, on a promissory note dated the 30th October 1856, made by defendant payable to Hutchison & Co., or order, for £50, 6s. 8d., at four months, and endorsed by Hutchison & Co. to plaintiffs.

4th count, on a promissory note dated the 2nd of February 1857, made by defendant payable to Hutchison & Co., or order, for £209, 9s. 4d., at four months, and endorsed by Hutchison & Co. to plaintiffs.

5th count, on a promissory note dated the 2nd February 1857, made by defendant payable to Hutchison & Co., or order, for £209, 9s. 5d., at three months, and endorsed by H. & Co. to plaintiffs.

*Pleas*—1st. That after the making of the notes, and while Hutchison & Co. were holders, defendant executed a mortgage dated the 8th of April 1857, whereby he conveyed to Hutchison & Co. certain lands, and entered into a covenant to pay Hutchison & Co. £718, 18s. 0½d. in six months, and the balance in one year from the date, in which amount was included the whole amount which the said notes had been given to secure, which mortgage defendant delivered to Hutchison & Co., and Hutchison & Co. accepted it in satisfaction and discharge of the notes and of the money therein specified, and which notes were endorsed by Hutchison & Co to plaintiffs after they became due.

2nd. As to the note dated the 10th of October 1856, for

£306, 1s. 3d., that before Hutchison & Co. endorsed the notes to plaintiffs, and while Hutchison and Co. were holders, on the 11th February 1857, an account was stated between Hutchison & Co. and defendant, in which the said note was included, and the defendant delivered to Hutchison & Co. his two promissory notes dated the 2nd of February 1857, which two promissory notes form part of the cause of action in the declaration mentioned, and Hutchison & Co. then accepted the two promissory notes in satisfaction for the first mentioned note, which note Hutchison & Co. endorsed to plaintiffs after it became due.

The plaintiffs joined issue.

The case was tried at the Toronto fall assizes 1860 before *Richards, J.* It was admitted that the notes were assigned to plaintiffs after they became due. John Hutchison was called as a witness by defendant. He proved a letter written by his book-keeper to defendant, dated the 11th of February 1857, as follows:—"Dear Sir,—We enclose you two notes for signature, one due the 5th of May, £209, 9s. 5d.; do. 5th of June, £209, 9s. 4d., £418, 18s. 9d., to meet your note due on the 13th of January, £104, 17s. 5d. and expenses 6s. 3d., £105, 3s. 8d.; do. on the 13th February, £306, 1s. 3d., interest £7, 13s. 10d., £418, 18s. 9d.; which please sign and return us in course of mail. We shall depend on your retiring your notes due 3rd of March and 16th of April, in full, and trust you will not fail to attend to them in time. Your obedient servant, HUTCHISON & Co." He also proved a letter written by himself to the defendant, dated the 26th of March 1857, as follows:—"Dear Sir,—We have your favour of the 23rd instant, and note contents. We accept your proposition, although it is giving much longer time than we can conveniently afford. We rely, however, on your paying it sooner if in your power. We enclose a statement of account with interest, shewing balance £724, 14s. 8d. Send us mortgage equally dividing amount at six and twelve months at your earliest convenience, and oblige yours, HUTCHISON & Co." The account enclosed was made out thus:—

Mr F. H. Armstrong in account with Hutchison & Co.

|   |      |    |         |
|---|------|----|---------|
| 1857, January 13th, To cash paid his note ...   | £104 | 17 | 5       |
| „ February 13th, „ „ „ ...  | 306  | 1  | 3       |
| „ March 3rd, „ „ „ ...  | 50   | 6  | 8       |
| „ April 16th, To his note due this date   | 228  | 18 | 7       |
| To interest due from 4th of Feb., average on £345, to 1st Oct., 239 days              | £13  | 11 | 1       |
| To interest from 26th of March, average on £345, to 1st of April 1858, 370 days ..... | 20   | 19 | 8       |
|   | —    | —  | 34 10 9 |

Amount due Hutchison & Co., £724 14 8

HUTCHISON & Co.

E. & O. E., Toronto, 26th March 1857.

The witness stated the true balance due on the 26th of March 1857 was £718, 18s. 0d. A mortgage dated the 8th of April 1857, made between defendant F. H. Armstrong and his wife, and John Hutchison & Co., was put in. By this defendant F. H. Armstrong, in consideration of £718, 18s. paid to him, the receipt whereof was thereby acknowledged, conveyed to Hutchison lot No. 7, 10th con., township of Derby, *habendum* in fee, on condition that if the mortgagor should pay Hutchison & Co. the full sum of £718, 18s.—half in six months and the residue in twelve months from the date—then that deed should be void, and defendant thereby covenanted to pay accordingly. This deed was executed by the mortgagor and his wife, and was registered on the 14th of April 1857, but it was not executed by Hutchison. The defendant's letter of the 23rd of March 1857 was produced and read. Addressed to Hutchison & Co. "Gentlemen,—Your favour of the 6th instant is at hand. I feel more sorry and disappointed in a measure than you can on the subject. I really do not know what to do. No money coming in—it is impossible to collect. I have sued and obtained judgment, but that is all I can do; in many instances I shall have to wait or lose a good many debts. However, this will not satisfy you. My cousin, who

is a young unmarried man, holds 200 acres of good land within three and a-half miles of this village—the Government deed taken out and no claim whatever on it. He desired me to mention that if you wished he would allow you to take a mortgage for the amount I owe you, payable in six and twelve months, to release me from the difficulty I have got into, as it is only time I require. The land is worth £4 per acre, and when the contemplated railroad is commenced lands here will advance rapidly in the market. Therefore, I think you would be quite safe to be secured in this way; then I would have a chance to collect and meet my liabilities. The account altogether is over £600—say £300 in six months, and £300 in twelve months. If you think proper I can get the mortgage executed here for you and sent down.—Yours truly, F. H. ARMSTRONG.”

The witness Hutchison went on to say that the defendant made the mortgage himself and sent it to him in that shape, that he held it as collateral security (the defendant's counsel objected to this statement being received). The witness said he expected to get the further security of the cousin when he wrote his letter of the 26th of March 1857. Three of defendant's notes, amounting to £647, 17s. 4d., were under discount when he received the mortgage; he assigned the notes and the mortgage to the plaintiffs in December 1857; on the 15th October 1857 the defendant made a further conveyance releasing the equity of redemption to the witness; this was made when the first instalment became due instead of foreclosing, in pursuance of a letter from defendant to Hutchison & Co., dated the 22nd September 1857, in which he made the proposal, and suggested that he could find a purchaser for the land. The letter contained this passage—“To enable me to give you that mortgage I was obliged to sell out everything to the person from whom I had the land, after he telling me, in the first place, that to assist me he would allow you to have a mortgage; then when it came to the point he would not do it unless I could secure him. The only way I could do so was as I have done; therefore I sold him my stock, and all at first cost (after paying my freight, about £70), so as to serve you.” The plaintiffs

offered some other letters of defendants in order to shew the terms on which the mortgage was received. They were not received, being objected to by defendant's counsel.

For the plaintiff—The subscribing witness to the deed of the 15th of October 1857 was called. He stated the deed was taken as a collateral security to save the expense of foreclosure, and to enable Hutchison to sell it. This evidence was also objected to. The plaintiffs claimed £790, 15s. 9d. A verdict was rendered for defendant, with leave to plaintiff to move to enter a verdict for the sum claimed, if in the opinion of the court the plaintiffs were entitled to recover.

In Michaelmas Term *M. C. Cameron* obtained a rule *nisi* to enter a verdict for plaintiffs pursuant to leave reserved.

*D. B. Read*, Q. C., shewed cause, citing *Parker v. McCrea*, 7 C. P. U. C. 125; *Price v. Moulton*, 10 Com. B. 573; *Fairman v. Maybee*, 7 C. P. U. C. 467.

*M. C. Cameron*, in support of the rule, cited *Shaw v. Crawford*, 16 Q. B. U. C. 101; *Pring v. Clarkson*, 1 B. & C. 14; *Twopenny v. Young*, 3 B. & C. 208; *Ashton v. Freeston*, 2 Scott, N. R. 273.

DRAPER, C. J.—I see no ground on which to distinguish this case from *Parker v. McCrae*, 7 U. C. C. Pl. 125, on which Mr. *Read* relied. I have looked at the case cited by Mr. *Cameron*, *Shaw v. Crawford*, 16 U. C. Q. B. 101; *Pring v. Clarkson*, 1 B. & C. 14; *Twopenny v. Young*, 3 B. & C. 208; and *Ashton v. Freeston*, 2 M. & Gr. 1. I have had frequent occasion to refer to them before, but they contain nothing to shake the conclusion arrived at in *Parker v. McCrae*.

These several notes constituted one entire debt when the mortgage was given, for though one of them was not in reality due at that time, Hutchison charged it to the defendant as a presently existing debt, and the defendant assenting to this, executed the mortgage covering it. The moment that mortgage was given and received, Hutchison's remedy on the notes was extinguished by the merger of the lesser security in the higher. It is no answer in the mouth

of Hutchison that at that moment the defendant was liable to the bank which had discounted and held these notes notwithstanding the mortgage.

Mr. Cameron pressed this point, but he cited no case, nor have I seen any which sustains his argument. There are, indeed, cases in which future advances being contemplated, and a mortgage or other security by deed being given to secure the debt to be created as well as a debt already due, the courts have deduced from what appeared on the face of the higher security, that it was collateral to, and therefore no merger of, the lower security given by bills or notes either for the existing debt or the new advances. But they have no bearing on the present case, where the facts are so wholly different. When Hutchison retired these notes from the bank he did not thereby acquire any new right against the defendant. He was remitted, as it were, to his first position as payee of the notes; there was neither a new debt nor changed security by that transaction, while the mortgage was given and accepted to secure the debt represented by the notes, and gave him a higher remedy to recover it.

I think the rule should be discharged.

*Per cur.*—Rule discharged.

## BALDWIN V. BURD ET AL.

### *Ejectment—Agency—Estoppel.*

In an action of ejectment by the executors of R. B. against defendant as lessee of R. B. deceased, receipts given by the attorneys of R. B. were proved, mentioning money paid as "due the Smeathman" estate.

*Held* that the doctrine of a tenant being debarred from denying the title of his landlord did not apply, the defendants appearing by the evidence to hold under the Smeathman estate, and not under the plaintiffs.

EJECTMENT for the south half of lot No. 20, 5th con. York. Writ issued the 29th of June 1860. Defence for the whole. The plaintiffs claimed title as executors and devisees under the will of the late Hon. Robert Baldwin in manner following:—That the defendant Elizabeth Burd was tenant of the said Robert Baldwin, under a lease or agreement in writing for a term which expired on the 1st of April

1856, and that defendant James Burd holds or claims under Elizabeth Burd. The defendant's claim was "by right of possession."

At the Toronto fall assizes 1860 the case was tried before *Richards, J.*

The plaintiffs proved a paper signed by the defendant Elizabeth Burd as follows:—"I agree to rent the south half of lot No. 20, in the 5th con. of York, from the Hon. Robert Baldwin for two years longer, from the 1st of April 1853, upon the same terms as my former holding from him, payment £5 *per ann.* half-yearly, 31st of March 1853."

Also another paper as follows:—"I agree not to disturb Mrs. Burd in the land forming the south half of lot No. 20, in the 5th con. of York, for one year longer at anyrate, from the 1st day of April 1855, on her paying five pounds for the same *per annum*, half-yearly, on this understanding, that she shall pay such increased rent for the same as shall be considered fair and reasonable to be imposed on any of the other tenants occupying the other lots of the lands belonging to Smeathman's estate. Toronto, 8th March 1855. Witness, Andrew Wilson. Signed, ADAM WILSON."

"I, Elizabeth Burd, above referred to, agree to the above terms. Witness, Andrew Wilson. Signed, ELIZABETH BURD."

Mr. Adam Wilson swore that this last paper was in Adam Wilson's handwriting, who was acting as Mr. Baldwin's agent then. That the property is called the Smeathman estate. He proved two receipts shown him on behalf of the defence, as follows:—

"Toronto, 10th Jan. 1856.—Received from Mrs. Burd the sum of five pounds, being one year's rent from November 1854 to November 1855, due to Smeathman estate. WILSON & HECTOR, per Andrew Wilson."

"Toronto, 11th of February 1857.—Received from Mrs. Burd the sum of five pounds, being one year's rent up to November 1856 (on land in the township of York) due Smeathman's estate. WILSON, PATTERSON, & BEATY, per C. M. Foster," who was a clerk in Mr Patterson's office.

The witness also stated that he understood that the late Dr. Baldwin had the management of the estate as agent of the estate; the heirs were named McDonald. Mr. Robert Baldwin succeeded to the management, he could not say how.

Probate of the will of the late Hon. Robert Baldwin admitted, which shewed the plaintiffs were his executors and devisees.

The learned judge directed a verdict for the defendant, as he thought the evidence did not shew a holding under Mr. Baldwin, but rather a letting by him as agent for another.

In Michaelmas Term *C. S. Patterson* obtained a rule *nisi* for a new trial for misdirection, contending that the evidence shewed the reversion by estoppel was in the late Robert Baldwin, and consequently passed to the plaintiffs, his devisees, as purchasers. He cited *Cuthbertson v. Irving*, 4 H. & N. 742; *Gouldsworth v. Knights*, 11 M. & W. 337; *Doe Radenhurst v. McLean*, 6 U. C. Q. B. 530; *Doe Boulton v. Walker*, 8 U. C. Q. B. 571; *Pomeroy v. Dennison*, 13 Q. B. U. C. 283. *J. H. Cameron*, Q. C., shewed cause.

DRAPER, C. J.—The plaintiffs claim to recover under the ordinary rule which prevails between the landlord and tenant, namely, that where a party has enjoyed land he is estopped to deny his landlord's title. The only question is, whether the whole facts which appear bring this claim within the operation of that rule?

It appears that Dr. Baldwin, the father of the Hon. Robert Baldwin, was agent for the Smeathman estate, that the Hon. R. Baldwin succeeded his father in the management of that estate, and that the land in question was part of that estate. How or when the defendant entered does not appear. Not under the memorandum of the 31st of March 1853, for that refers to the fact of a former holding from Mr. Baldwin, and I think the presumption on the whole evidence is that she became tenant to the parties who legally represented (I mean, were legally entitled to) the

Smeathman estate, the heirs of which were named during the trial.

If I thought the proper conclusion from the evidence was that the defendant Elizabeth Burd, without reference to the heirs or other legal representatives or owners of the Smeathman estate, had simply entered as tenant to the Hon. R. Baldwin, I think she would be in the ordinary condition of a tenant who has estopped himself to dispute the title under which he got into possession. In that case it might be assumed (whatever the claims of the Smeathman estate or those who represented it) that Mr. Baldwin was acting on his own behalf, but I think the evidence leads to a contrary conclusion, and shews that, as in *Fleming v. Gooding*, 10 Bing. 549, the estoppel is rather to deny the title of those representing the Smeathman estate. If the plaintiffs' counsel had desired that it might be left to the jury to say whether the defendant Elizabeth Burd originally entered into possession under an agent for the Smeathman estate or under Mr. R. Baldwin individually, the learned judge would no doubt have felt it proper to take the opinion of the jury on that point. But the evidence of Mr. Andrew Wilson, the plaintiffs' own witness, seemed to shew so clearly that the land was let by Mr. R. Baldwin in the character of agent that I presume it was thought unnecessary to contest it.

The late Sir *James Macaulay* and myself did not concur in the opinion intimated by the learned C. J. of the Queen's Bench in *Doe Radenhurst v. McLean*, and though I joined in the judgment in *Doe Boulton v. Walker*, I do not feel inclined to extend the doctrine. The cases of *Doe Knight v. Lady Smyth* (4 M. & S. 347) and *Doe Bullen v. Miller* (2 A. & E. 17) put the matter on its true footing.

On the whole, I think the rule should be discharged.

*Per cur.*—Rule discharged.

*Rogers v. Pitcher*, 6 Taunt. 202; *Fleming v. Gooding*, 10 Bing. 549; *Cooper v. Blandy*, 1 Bing. N. C. 45; *Claridge v. McKenzie*, 4 M. & G. 143.

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## SMITH ET AL. V. DEMPSEY ET AL.

*Bankrupt act, 7 Vic. ch. 10—Insolvent—19 & 20 Vic. ch. 93.*

Declaration on a promissory note and on common counts.

*Plea* by defendant P. C. D. that he had been a trader in Upper Canada within the meaning of the Bankrupt Act, 7 Vic. ch. 10, *and since the expiration thereof became insolvent, &c.*, but not stating that he was insolvent at the date of the passing of the act 19 and 20 Vic. ch. 19, whereunder he filed his petition, and by order of the judge of the county court for the county of Hastings claimed to be exempt from process, &c.,

*Held* not sufficient under 19 and 20 Vic., and that the clause in the order "and it appearing that the said P. C. D., by virtue of the statutes in that case (19 Vic.) made and provided, is entitled to the protection of his person," &c., cannot be construed as an adjudication by the court that the petitioner was insolvent at the time of the passing of the act.

The first count of the declaration was on a promissory note, dated 29th March 1856, made by the defendant Peter C. Dempsey, payable to the other defendant, for £50, 17s. 4d., at three months after date, and endorsed by the payee to the plaintiffs. There were also the common counts. The defendant William Dempsey let judgment go by default.

Defendant Peter C. Dempsey pleaded that on the 30th January 1857 he filed his petition for protection from process in the insolvent court for the county of Prince Edward, in which county he had resided twelve calendar months next before presenting the same; that he so presented his petition after the passing of the act to extend the provisions of the Insolvent Debtors Act of Upper Canada, 19 & 20 Vic. ch. 93, and for the relief of a certain class of persons therein mentioned, and that he had been a trader in Upper Canada within the meaning of the Bankrupt Act, 7 Vic. ch. 10, and *since the expiration of the said act became insolvent*, and by reason of such expiration had been and was unable to avail (*sic*) *themselves* of its benefits; that he presented his petition after the passing of the said first mentioned act, and acted under the same, and such proceedings were thereupon had in the insolvent court of the county of Hastings, that at a regular meeting of the said court at Picton, in the said county, a final order for protection and distribution was then made by the judge of the said court, and that the said cause of action was contracted before the filing of the petition, and thereupon he was discharged therefrom. Issue.

At the trial the defendant put in a final order made by the judge of the county court of the county of Prince Edward, dated 21st March 1857, stating "that the said Peter Charles Dempsey having presented his petition for protection from process to this honourable court, and such petition having been duly filed in court, and the said petitioner having duly appeared and been examined touching his debts, estate, and effects, and it appearing that the said Peter Charles Dempsey, by virtue of the statutes in that case made and provided, is entitled to the protection of his person from being taken and detained under any process whatever in respect of the several debts and claims hereinafter mentioned, a final order is hereby made to protect the person of the said Peter Charles Dempsey from being taken or detained under any process whatever in respect of the several debts or sums of money due, or claimed to be due, after the time of filing his petition, from the said petitioner to these several persons named in his schedule as creditors, or as claiming to be creditors for the same respectively, or for which such persons shall have given credit to the said petitioner before the time of filing his petition, and which were not then payable; and as to the claims of all other persons not known to the said petitioner at the time of making this order who may be endorsees or holders of any negotiable security set forth in his said schedule."

The plaintiff did not deny that this order proved the plea, but he denied the plea shewed a defence. A verdict was thereupon given for the defendant Peter C. Dempsey, and damages were assessed against the other defendant.

In Easter Term *O'Hare* moved for a *venire de novo*, or for judgment *non obstante*, contending the plea was no answer, and that the plaintiff should have had a verdict for the same damages as were assessed against the other defendants.

In Michaelmas Term *Walbridge*, Q. C., shewed cause, asking to amend the plea if necessary, but contending that as the certificate was in the form pointed out by the Insolvent Debtors Act, 8 Vic. ch. 48, it was a good defence under the 19 & 20 Vic. ch. 93, sec. 2.

*S. Richards*, Q. C., objected that there was no sufficient allegation in the plea that Peter C. Dempsey was one of the particular class of persons defined in the statute, and entitled to relief under its provisions; it was not enough that he had been a trader subject to the bankrupt laws, and therefore excluded from the operation of the Insolvent Debtors Act, 8 Vic. ch. 48, nor that he had become insolvent since the Bankrupt Act expired. This insolvency must have existed at the time the act 19 and 20 Vic. ch. 93, was passed, or the defendant did not come within it.

DRAPER, C. J.—I certainly did not understand Mr. *Richards*' point during his argument, and thought the objection went rather to the nature of the proof given than to the substance of the plea, though on looking at the matter since more closely I see the objection now relied upon was suggested and taken on behalf of the plaintiff.

The preamble to the statute 19 and 20 Vic. recites that "there are many persons who having been traders in Upper Canada within the meaning of the Bankrupt Act, either before or since the expiration thereof *have become* insolvent, but by reason of such expiration have been unable to avail themselves of its benefits," and that such persons "from having been such traders are precluded from the benefit of the Insolvent Debtors Act." The first section then enacts "that all such traders coming within the description above in the preamble to this act set forth" shall be entitled to the benefit of the 8 Vic. ch. 48, and (section 2) that the final order under the 8 Vic., in addition to the effect given it by the fourth section of that act, shall operate as a discharge of all debts or liabilities due or contracted up to the time of the presentment of the petition of insolvency as fully and to the same extent as if such trader had obtained a certificate under the 59th sec. of the Bankrupt Act.

All turns on the preamble. It defines as a class persons who (having been traders within the meaning of the Bankrupt Act, either before or since the expiration thereof) have become insolvent. Now, if we transfer this definition to and incorporate it with the first section, as in order to under-

stand the words "such traders" we must do, the first section will read thus:—

"All persons who either before or since the expiration of the Bankrupt Act, 7 Vic. ch. 10, were traders within the meaning of that act, and who have become insolvent, shall be entitled to avail themselves," &c. It is not said who "have or shall hereafter become insolvent," and therefore it makes insolvency at the time of the passing the act—that is, on the 1st of July 1856—part of the definition of the persons for whose benefit the act was passed.

Taking this as the meaning of the statute, the plea would be proved if it appeared that Peter C. Dempsey became insolvent on any day between the 1st July 1856 and the 30th January 1857, the day on which his petition for protection was presented; but this proof would not meet or fulfil the definition of the persons whom the statute was intended to aid. The plea is therefore defective in substance. The defendant's counsel, however, asked for leave to amend if it were necessary. The amendment of the plea would be simple enough by adding to the averment, that since the expiration of the Bankrupt Act he became insolvent, the further statement, "and was insolvent at the time of the passing of the act, entitled," &c. (19 and 20 Vic. ch. 93), or making the averment run thus—and since the expiration of the said Bankrupt Act, and before the passing of the act, &c. (19 and 20 Vic.), he had become insolvent, and I see no objection to our granting that amendment now on proper terms.

But when made, will the final order, which is the only proof, establish the amended plea? The introductory part of the final order reads thus:—"In the matter of the petition of Peter Charles Dempsey, of, &c., an insolvent debtor, and being a trader in Upper Canada within the meaning of the Bankrupt Act passed in the *seventeenth* (*sic*) (should be seventh) year of the reign of Her Majesty, ch. 10, and since the expiration thereof hath become insolvent, and by means of such expiration hath been unable to avail himself of its provisions: Be it remembered that the said," &c. The residue is already set forth, and follows the form given in the 8 Vic. ch. 48, to which the addi-

tional effect is given by the second section of the last act. Now these introductory words are, as I construe them, words of description of the person, not of adjudication of the fact. They set out who and what Peter Charles Dempsey is, and if he became insolvent before the presentment of his petition, but after the 1st July 1856 such description would be correct, just as it would be if he became insolvent before that day, and therefore as a description it does not help, and the adjudication "and it appearing that the said Peter Charles Dempsey, by virtue of the statutes in that case made and provided, is entitled to the protection of his person," &c., cannot, I think, enlarge the description, for it is an adjudication, not *of* the facts involved in the description—not *upon* them—and therefore there is no intendment that the court have necessarily adjudged that the petitioner was insolvent at the passing of the last act; for if he never had been a trader the final order would still be valid for the purposes of the 8 Vic., ch. 48, though it would not have the additional effect given by the 2nd sec. of 19 & 20 Vic., ch. 93.

I think, therefore, the plea if amended would not be proved by the order.

The result is that the plea as it stands is no defence; that if amended, and we grant leave to amend, and think it should be on payment only of such costs as would have been incurred by amending before the issue book was made up (because plaintiff ought to have demurred), the evidence given would not sustain it, and therefore there should be a new trial without costs on the amended plea. If the defendant does not amend within one month, then there should be a *venire de novo*, for the jury have found for defendant on an insufficient plea, and there is nevertheless nothing found on the record which will enable the plaintiff to recover.

*Per cur.*—Judgment accordingly.

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## SMITH V. CLEGHORN.

*Bond—Breach of—Exemplification of judgment—Estoppel by Evidence.*

Upon an action on a bond from one A. C., defendant, to S. (sheriff), indemnifying him, &c., by reason of his paying over to A. C. \$390, alleged to be due defendant for rent of the premises on which the goods, out of which the money was made, were seized (the rent not having accrued due at time of seizure), assigning as a breach that defendant did not indemnify, &c., but permitted one J., an execution creditor (whose writ of *fi. fa.* was in S.'s hands at the time of seizure), to recover a judgment against him S. (which he had to pay) for not paying over the amount paid to defendant for rent, an exemplification of J.'s judgment was put in at the trial,

*Held* that the exemplification of J.'s judgment was an estoppel upon the defendants, and that defendants were rightly prohibited at the trial from giving evidence of the time at which the rent accrued due.

DEBT on bond made by defendant, dated 8th November 1859, in the sum of \$550, subject to a condition containing a recital that there were divers executions against one Peter O'Banyon, and there was a demand for rent amounting to \$400 made by one Wilkes, as landlord of O'Banyon, on 12th April 1859, and notice thereof was served on the plaintiff, and that there were not sufficient goods on the premises occupied by O'Banyon, as tenant to Wilkes, to satisfy the execution and the rent, and that the execution creditors and Wilkes each claimed to be entitled to the proceeds of the sale of the goods, and that Wilkes had assigned the rent to the defendant Cleghorn, and that said Cleghorn, in consideration of the plaintiff paying over the amount of the rent to him out of the proceeds of the goods seized and sold by plaintiff as sheriff on the premises of O'Banyon, of which Wilkes was landlord, undertook to indemnify him against all actions, &c., and declaring that if Cleghorn should indemnify the plaintiff, his heirs, &c., and his and their lands, &c., from all damages, &c., on account of paying over and satisfying the said Cleghorn, the sum of \$390, the amount of rent claimed to be due to Wilkes and assigned to Cleghorn, and which Cleghorn alleged became due on 1st April 1859 from O'Banyon, then the obligation to be void.

First breach, that Cleghorn did not indemnify, &c., but, on the contrary thereof, permitted one Wellesly Johnstone, one of the execution creditors of O'Banyon, to bring an action

against plaintiff, and the said Wellesly Johnstone did bring such action and recovered against plaintiff \$546, 32, which the plaintiff was obliged to pay, and that plaintiff was obliged to pay \$20 in defending himself from the said action. A second breach of a similar character, by reason whereof the said writing obligatory became forfeited.

*Pleas 1.—Non est factum.*

2nd. That plaintiff hath not been damnified by reason of anything in the bond mentioned.

3rd. No record of the supposed recoveries. Issues on the first two pleas to the country.

The trial took place at Brantford in October 1860 before *Hagarty, J.* The plaintiff proved that Cleghorn received the rent of \$390, and the execution of the bond was admitted. It was further proved by a witness who was present at the trial of the cause mentioned in the declaration of Wellesly Johnstone v. John Smith, the now plaintiff, that the question then tried substantially was, whether rent was due to Wilkes. It was stated that the plaintiff in that suit was prepared with evidence to establish neglect of duty on the part of the sheriff, and the case went to the jury as to the money paid by the present plaintiff to the present defendant for Wilkes' rent. Johnstone claimed more than that amount, contending that the sheriff, the now plaintiff, was liable whether the rent was due on the 1st or on the 10th April. This witness said he understood the now defendant was the person beneficially interested in the defence of the former action. A verdict was recovered therein for \$390, and the now plaintiff had to pay, and did pay, \$144, 68.

The exemplification of judgment in Johnstone v. Smith was also put in by the plaintiff. For the defence it was objected that Johnstone's action was for not levying till the rent became due, since the writ had been in the sheriff's hands long before. The first count in the declaration was for not levying, and the declaration contained another count, and the verdict being general it did not necessarily follow that it was rendered in consequence of his paying over the money made to the landlord for the rent.

It was agreed that leave should be reserved on this

evidence, and these objections to move to enter a nonsuit. The learned judge was of opinion that on the bond itself and the evidence the plaintiff shewed a right to recover irrespective of the sheriff's liability to him as landlord.

The plaintiff obtained a verdict for \$550.

In Michaelmas Term *M. C. Cameron* obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial on the law and evidence, and for misdirection in directing that the exemplification of judgment put in at the trial was a conclusive estoppel upon the defendants, and also for the rejection of evidence relative to the time when rent became due.

*Harrison, R. A.*, shewed cause, at the same time putting in the exemplification of the judgment of *Johnstone v. Smith* to support the issue for the plaintiff on the plea of *nul tiel record*.

As to the rule, he contended the production of the exemplification at *nisi prius* was unnecessary and did not affect, nor was it evidence on, the plea of *non est factum*, and that plaintiff was not damnified. The present defendant who, he contended, really defended the suit *Johnstone v. Smith*, was now setting up the same matter which had been urged for the sheriff, the defendant on the trial of that cause, and which had been then deemed insufficient. He contended that the plaintiff shewed enough to entitle him to recover without the exemplification.

*M. C. Cameron* pointed out a variance between the declaration and the record produced in the sum, and stated that there was nothing in the exemplification to show that the judgment was obtained in that suit for not paying over the \$390 to the execution creditor of *O'Banyon*, while the declaration in this case averred that to be the fact. It did not appear that the \$390 was paid over for rent. The exemplification proved a judgment against the plaintiff at *Johnstone's* suit, but it was consistent with all that the exemplification shewed that the judgment was for a different cause of action than was stated in the declaration in the present suit.

DRAPER, C. J.—On examining the learned judge's notes I find no minute whatever of any objection being made to his charge, and from the manner in which the case went off, leave being reserved to move for a nonsuit at the close of the plaintiff's case, and no evidence being given for the defendant, I do not see how any such direction to the jury as is now objected to could have been important or necessary. Nor is there any mention of evidence being tendered for the defence. Neither of these objections were sustained in argument.

We have, therefore, only to consider whether on the evidence given at the trial the plaintiff is entitled to recover, and whether the plaintiff is entitled to judgment on the issue of *nul tiel record*.

The first breach in the declaration of the condition of the bond is, that the defendant Cleghorn did not indemnify, &c., but suffered Wellesly Johnstone to bring an action against the plaintiff on account of the plaintiffs having paid over to Cleghorn the said sum of \$390 for rent, and that Johnstone did recover \$546, 32 for damages and costs in that action, which the plaintiff was forced to pay.

The second breach is that Johnstone brought an action against the plaintiff by reason of the plaintiff having so paid over to Cleghorn the said sum of \$390 as in the condition mentioned, and that Johnstone recovered against plaintiff \$546, 32 for damages and costs, which Cleghorn would not pay and indemnify the plaintiff against, although often requested, but suffered the same to be made out of the effects of the plaintiff. I perceive no substantial difference between the two breaches.

The exemplification shews that Johnstone declared against the sheriff, the present plaintiff, in two counts. The first, alleging a recovery against one O'Banyon for £196, 13s. 2d., avers the suing out and delivery to the sheriff of a writ of *fi. fa.* against O'Banyon's goods endorsed to levy £192, 16s.; £3, 17s. 2d. for costs with interest, £1 for writ and the sheriff's fees; that the sheriff seized goods of O'Banyon of the value of the moneys endorsed, yet the sheriff had not those moneys except a part, but therein made default, nor did he

pay them to Johnstone, but falsely returned that he had made £142, 1s. 7d., besides disbursements; that he paid rent due on the premises, £101, 5s.; on a prior execution in favour of Cleghorn, £10, 16s. 7d.; his own fees, £3, 3s. 9d., leaving a balance of £26, 16s. 3d., which he had ready, and that O'Banyon had no other goods. The second, alleging the same judgment and delivery of the same *fi. fa.*, endorsed as above to the sheriff, avers that there were goods of O'Banyon within the bailiwick of the sheriff on which he might have levied, and a reasonable time for so levying had elapsed before the commencement of that suit, yet the sheriff did not levy the moneys last aforesaid, excepting a part, but made default, and wrongfully neglected the execution of the writ, and afterwards falsely returned (as in the first count). The sheriff pleaded, 1st, not guilty; 2nd, to the 1st count, that he did not "seize or take" the moneys directed to be levied other than the moneys in the return mentioned; 3rd, to the 2nd count, that there were not at the time of the delivery of the writ or afterwards any goods of O'Banyon, besides the goods in the return mentioned, sufficient in value to satisfy the writ and the rent, whereof the sheriff had notice. The replication to the 2nd plea states that the sheriff did seize and take other moneys than the moneys in the return mentioned, and that the appropriation of the moneys admitted in the return is unlawful, fraudulent, and false. And the replication to the third plea states that there were goods of O'Banyon, other than the goods and chattels in the return mentioned, sufficient to satisfy the moneys endorsed, and that the payment of the alleged rent, and the other writ of *fi. fa.*, was false, fraudulent, and unlawful. The *postea* states, as to the second issue, that the jury say that the defendant did seize and take other moneys, &c., being an affirmative statement of the whole matters alleged in the replication to the second plea; and as to the third issue, a similar affirmation of all the matters alleged in the replication to the third plea, and they assessed the damages at \$390, over and above the costs, and the judgment is entered for \$390 damages and \$156, 32 costs. There is apparently no finding on the first issue at all.

I have felt some difficulty in finding out what these pleadings really do put in issue. But looking at the whole record exemplified, and comparing the pleas, the replications, and the finding of the jury, I think they amount to this, that there were goods of O'Banyon all of which Johnstone insisted were liable to his execution; that the gist of his complaint was that the sheriff had not applied all the moneys, the proceeds of those goods, to the satisfaction of his execution, but instead thereof had applied part in payment of rent due on the premises occupied by O'Banyon, on which the goods were seized, while the sheriff insisted that his appropriation of the moneys in payment of the rent and of the small execution was right. As to the first count, this conclusion is obvious enough. But there is more difficulty with the second, which seems to be meant to charge the sheriff with neglecting to seize goods of O'Banyon other than those which the sheriff did seize and sell, or possibly to charge that by delaying the seizure and sale after he received the writ until after the rent became due he left the goods liable to satisfy the rent, and so the plaintiff was injured. But the count so framed hardly brings up this question, and the replication, although reiterating that there were goods of O'Banyon other than those seized by the sheriff, winds up by asserting that the payment of the rent and of the prior execution stated in the return was "false, fraudulent, and unlawful," which points to a claim for the moneys actually made, and not to a neglect for not seizing other goods, and is wholly at variance with the idea that the goods were liable to satisfy the rent. I think, therefore, that the plaintiff brings in question not so much the falsehood of the return that O'Banyon had no other goods besides those which the sheriff sold, but rather that the plaintiff had a right to all the moneys made in preference to the landlord and the other execution creditor. The parol evidence given at the trial of the present action, namely, that the substantial question at the trial of Johnstone's suit was whether the rent was due to Wilkes, is consistent with this view. I think, therefore, the rule for nonsuit should be discharged.

It seems, on examining the record produced on the issue of *nul tiel record*, that there is no variance as suggested. The plaintiff therefore must have judgment on this issue.

HAGARTY, J.—To prevent any misunderstanding as to the rejection of evidence, I wish to state that no particular witness was tendered or rejected, but I told defendant's counsel that I would not receive evidence to try the case of *Johnstone v. the Sheriff* over again, and that I considered the evidence of Mr Wood's clerk shewed as a fact what took place at that trial, and what the real contest there was. I would have at once admitted evidence if offered to shew that witness to be mistaken, but I would not receive it to shew any neglect or delay of the sheriff to levy in the original suit.

I saw no difficulty whatever at the trial, nor has the argument in term suggested any to my mind, against the plaintiff's right to recover. The recital in the bond explicitly shewed the act against which he was indemnified, and I think it beyond question that that very act was the cause of his being made answerable in *Johnstone's* suit.

*Per cur.*—Rule discharged.

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### THE QUEEN V. THE CORPORATION OF THE UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM.

*Mandamus*—*Con. Stat. U. C., ch. 89, sec. 3*—*Division of county for registry purposes under—Duty of council to provide offices, &c.*

The county of Northumberland having been on the 1st of December 1859 divided into ridings, east and west, for registry purposes, and the county council having for eighteen months neglected to provide offices, vaults, &c., for the safe keeping of the books, &c.—On return to a writ of *mandamus*,

*Held* that ch. 89, sec. 3, of *Con. Stats. of U. C.* is declaratory of the 19th sec. of 9 Geo. IV. ch. 34, and governs cases before the passing thereof (December 5, 1859), and that the defendants are under said act obliged to furnish offices, vaults, &c.

In Trinity term last the court granted a writ of *mandamus nisi*, directed to the defendants, reciting that on the 1st of December 1859 a separate registry office for the East Riding of the county of Northumberland for the registration of deeds, &c., within the said East Riding, was duly estab-

lished, pursuant to the statute 22 Vic. ch. 95, in that behalf, and that the village of Colborne, in the said East Riding, was duly proclaimed, named, and fixed as the place where the office of registrar of the said East Riding should be held, until the erection of the said East Riding into a separate county and the fixing therein of a county town. That the application, as is said, had been made to the defendants, on behalf of John Merriam Grover, to provide at the expense of the said united counties, not exceeding \$1000, fire-proof offices and vaults at the said village of Colborne, where the said registry office is and is to be kept for the safe keeping of all the books and other papers belonging to the said office of registrar of the said riding, as required by the Consol. Stats. of U. C., ch. 89. But that the defendants not regarding, &c., have and do neglect and refuse; and said fire-proof office and vaults have not been provided, whereupon the said John Merriam Grover hath brought, &c., and commanding the defendants that immediately after the receipt of the writ they should without delay provide at the expense of the said united counties, not exceeding \$1000, safe and proper fire-proof offices and vaults at the said village of Colborne, in the said East Riding, for the safe keeping of all books, &c., belonging to the said office of registrar for the said East Riding, pursuant to the Consol. Stats. of U. C., ch. 89, lest in their default the same complaint should be repeated.

By the affidavit filed on moving for this writ it appeared that under ch. 89, sec. 3, of the Consol. Stats. U. C., a proclamation was issued under the great seal, dated 1st December 1859, setting apart and establishing a registry office for the East Riding of the county of Northumberland, and naming the village of Colborne by the name of the town of Colborne, as the place where such registry office should be held, until the erection of the East Riding into a separate county, and the fixing therein of a county town. That John Merriam Grover on the 2nd of December 1859 was appointed registrar of the East Riding, and still holds the appointment. That since his appointment no office has been provided for him as such registrar by the county council; it also verifies a printed copy of the proceedings of the municipal council of

Northumberland and Durham at their May and June sessions 1860; that the proceedings set forth therein, and referred to in the affidavit, are true copies of the original entries in the books and papers of the council; that on the 29th of May 1860 J. M. Grover made a requisition that they should provide safe and proper fire-proof offices and vaults at the village of Colborne, for the safe keeping of all books, &c., belonging to the office of registrar for the said East Riding. And that if the said council should not at their then next session take action thereon, he should consider it as a refusal, which requisition was before the said council on the 29th of May as appears by the minutes, and was referred to the next ordinary session of the council, which was held on the 19th of June 1860. That on the 21st of June 1860 the standing committee of the council on county property reported that "they cannot recommend the building of a registry office, vaults, and safes in Colborne, this council having been given to understand that if the registry office was located in Colborne, that the village would furnish all the requirements necessary for said office. In the event of that corporation failing to do so immediately, your committee recommend that application be made to the Governor and council to remove the said office to Brighton, where your committee are assured a suitable office, safe, and vaults will be prepared immediately, free of expense to these counties," which report the council adopted. That the council refuse to perform their duty as laid down by sec. 8 of ch. 89, Con. Stats. of U. C., and they have made no provision for the erection of a registry office in the said East Riding.

In Michaelmas Term, on the first day of which the writ of *mandamus* was returnable, the defendants returned—

That the county of Northumberland is composed of two ridings, the East and the West Riding.

That the council never desired or approved of the appointment of a separate registry office for the East Riding, and never gave any sanction or consent thereto.

That in the opinion of the said council there was not, nor is at the present time, any necessity, nor did the convenience of the inhabitants of the East Riding require a separate registry office.

That if such separate registry office had been required, the village of Colborne is not the most convenient or eligible place in the East Riding for such registry office, and would not have been selected by the council or a majority of the inhabitants of the East Riding.

That a division of the county of Northumberland has been for a long period agitated by many of the inhabitants, and is likely at some period to be carried into effect.

That should such separation take place, the county town of that portion constituting the East Riding would not, in the opinion of the council, be Colborne, but Brighton, as it is the more central, and in the opinion of the inhabitants of the East Riding, the more proper place.

That in the event of Brighton being appointed the county town, the registry office would be required to be moved to Brighton, and under such circumstances the county council do not consider it reasonable or judicious to expend \$1000 of the money of the counties in building a registry office or vaults at Colborne.

That the separate registry office was established as on the 1st of December 1859, before the Consolidated Statutes of Canada came into force.

That as the county council have never sanctioned or approved of the establishment of the said registry office at Colborne, or in the East Riding, they submit they are not obliged or required by the statutes, then or now in force in that behalf, to expend the said sums for the erection of the said registry office.

And for these reasons the corporation of the said united counties have not proceeded to provide, at the expense of the said united counties, fire-proof offices and vaults at the said village of Colborne for the purpose and in manner and form as by the said writ they are commanded, submitting that they are not by the statute and laws of the province obliged or bound so to do.

*S. Richards, Q. C.*, moved to quash the return for insufficiency.

*Harrison, R. A.*, shewed cause.

The statutes 9 Vic. ch. 34, sec. 19, and Consol. Stat. U. C. ch. 89, secs. 3, 8, 74, sub-sec. 11, and sec. 4, were referred to.

DRAPER, C. J.—The statute 22 Vic. ch. 95, sec 1, Consol. Stat. U. C. ch. 89, sec. 3, authorises the Governor, if he deems the circumstances of any city, or of any junior county of a union of counties, or *riding* of a county or counties, not set apart for judicial or municipal purposes, such as to call for or render expedient or advisable the establishment therein of a separate registry office, by an order in council to cause to be issued a proclamation under the great seal, and thereby to set apart and establish a registry office for such city or junior county or riding of a county or counties, and in the case of a junior county or riding, to name some place where the office of registrar should be held until the dissolution of such union of counties or erection of such riding into a separate county, and the fixing therein of a county town, when such registry office shall be removed to and kept in such county town. The next section enacts that upon the issuing of any such proclamation all acts and parts of acts and provisions of law in force at the time thereof in reference to the establishment of registry offices within Upper Canada, or in connexion therewith, and all laws in reference to the registration of deeds or other instruments, shall, except in so far as the same may be inconsistent with the provisions of this act, apply to registry offices so set apart and established, and the word county in those acts shall include a city as well as a junior county, or a riding of a county or counties for which a separate registry office shall be established under this act, and the duties imposed upon municipal councils shall, in the case of such junior county or riding, be discharged by the municipal council of the counties of which such junior county or riding shall form part.

The 19th sec. of 9 Geo. IV. ch. 34, is I, apprehend, virtually superseded by the 8th section of the Consol. Stat. of Upper Canada, ch. 89. For the first threw the *onus* of providing fire-proof offices and vaults on the registrar

within 18 months after the passing of the act, and in case of his neglect authorised the district council to fix upon the most convenient site, and to erect the office at an expense not to exceed \$1000, and makes that office so erected to be thenceforth the registry office of the county. But the latter enacts that for the safe keeping of books, &c., belonging to the office of registrar, the council in each county shall provide, at the expense of the county, not exceeding \$1000, safe and proper fire-proof offices and vaults at the place where the registry office is to be kept.

The only question of law raised by the return is, Whether this section of the Consol Stat. applies to this case?

The Consolidated Statutes came into force on the 5th of December 1859. The proclamation setting apart and establishing this new registry office is dated the 1st of December 1859, and the registrar was appointed on the following day.

The act "respecting the Consolidated Statutes for Upper Canada," secs. 8 and 9, provides that the Consolidated Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation, and as declaratory of the law as contained in the said acts and parts of acts so repealed, and for which the said Consolidated Statutes are substituted. But if upon any point the provisions of the said Consolidated Statutes are not in effect the same as those of the repealed acts or parts of acts for which they are substituted, then as respects all transactions, matters, and things subsequent to the time when the Consolidated Statutes are to take effect, the provisions contained in them shall prevail, but as respects all transactions, matters, and things anterior to the said time, the provisions of the said repealed acts and parts of acts shall prevail.

The 9 Vic. ch. 34, is in schedule A to the act just above referred to as, with the exception of the second section mentioned, wholly repealed.

The first provision of section 19 of that statute as to the registrar's building fire-proof offices was effete. The eighteen months after the passing of that act had long expired, and it was obviously meant to apply to the then registrars,

and was intended to give them the choice of erecting their own offices, or of allowing the municipal council to do so at any place within the county the latter might select. It may perhaps be urged that the duty of building the fire-proof offices at the public expense only arose where the registrar neglected to do so within the prescribed period, and it must be admitted the language used gives rise to a doubt whether the municipal councils were obliged to erect fire-proof offices where new counties were erected more than 18 months after the passing of that statute, or even in cases where the registrar had erected a fire-proof office, and had died or resigned, or been removed from office, and his successor was appointed more than 18 months after the 9th Vic. was passed. But whatever would have been the construction of that statute, the language of the 8th section of the Consolidated Act leaves no room for doubt, and if it be declaratory it shews the answer to be insufficient, and if it be a new enactment I can perceive no reason why it should not govern this case. The council in each and every *county* which, for the purpose of cases like the present, is declared by the 4th sec. to include a riding of a county, shall provide proper fire-proof offices or vaults at the place where the registry office is to be kept. This has never yet been done in this riding, and the statute requires that it shall be done, and by the council of the county.

I think, therefore, the return is insufficient, and must be quashed. I cannot understand why so much irrelevant matter has been introduced into it. The court have only to deal with the legal question, and the return should have been confined to that. The duty of building fire-proof offices and vaults does not depend upon their approval by the council of there being a new registry office, or of the place selected for it.

I think the return should be quashed, and a peremptory mandamus should go.

*Per cur.*—Rule accordingly.

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CLAPP V. THE CORPORATION OF THE TOWNSHIP OF  
THURLOW.

*By-law—Illegality of—Municipal corporations act—Con. Stat. U. C., ch. 54,  
sec. 223.*

A by-law authorising the reeve to issue a debenture, to be paid out of the taxes of the year following, thereby creating a debt,

*Held* bad, the requirements of sec. 223 Municipal Corporations Act not having been complied with, though the by-law came within its provisions.

*English* in Trinity Term obtained a rule, returnable on the first day of this term, calling upon defendants to shew cause why a by-law passed by them on the 12th of January 1860, numbered 27, for the purchase of a lot in the village of Canniffton, in the county of Hastings, from one Charles E. Turnbull, and authorising the issuing of a debenture in payment therefor, should not be quashed with costs. First, because the by-law is for raising money upon the credit of the corporation by the issue of a debenture, which money was not required for its ordinary expenditure, and is not payable within the same municipal year that it was passed, and should, before the final passing thereof, have received the assent of the electors of the municipality as provided by the 190 section of the municipal act of 1859. 2nd, Because no notice of the said by-law was ever given. 3rd, Because the by-law does not provide for an additional rate per annum for the payment of the debt thus created. 4th, Because the by-law does not name a day in the financial year in which the same is passed when the by-law should take effect. 5th, Because the purchase of a site for a town hall is not an ordinary expenditure or liability that the said township corporation could incur without the assent of the ratepayers. 6th, Because the retiring council of 1859 could not legally pass the by-law just at the expiration of their term of office without the assent of the electors, the debenture being payable out of the taxes to be levied for the year 1860, and not within the same municipal year that the by-law passed. 7th, Because there had been no promulgation, and no legal assent thereto. 8th, Because the property named in the by-law has not been taken possession of by the present council although deeded to the corporation, and upon affidavits and papers filed.

The affidavit of the relator Philip Clapp stated that he was a resident of the municipality, and interested in the by-law; that the copy of the by-law annexed to the affidavit under the hand of the clerk of the council, and under the corporate seal, was received by him from the clerk of the council; that he is a member of the present council, and was one also of the council for 1859, and voted against the by-law; that the by-law was introduced and passed at the last meeting of the council for 1859 on the 12th of January 1860, and after the election of the members for 1860, but before they were sworn in; that there was no assent of the electors of the municipality before the by-law was finally passed, nor was any notice or publication of the same made or given, nor does the by-law provide or impose any rate or assessment on the rateable property of the municipality for the payment of the debenture issued under the authority of the same; that the by-law creates a debt, but names no day in the financial year in which it was passed when it shall take effect, nor does it provide an equal special rate per annum in addition to all other rates to be levied in the year for the payment of the debt and interest.

The by-law contained two clauses. The first authorising the reeve to purchase a specified lot, it being a suitable lot for the site of a town hall for the township of Thurlow. The second authorising the reeve to issue a debenture for \$900, being the price of the lot, said debenture to be paid out of the taxes of the year 1860.

In Michaelmas Term *S. Richards*, Q. C., shewed cause. He filed the affidavit of Charles E. Turnbull, who stated that he sold this land to the corporation in perfect good faith, and without any knowledge of illegality in the by-law, and on or about the 13th of January conveyed the land to them, and delivered them possession, which they have had ever since, receiving a debenture payable in December next for the purchase money. He also filed the affidavit of Charles Canniff, the clerk of the corporation, which contained the same account of the deed and debenture as did the affidavit of Charles E. Turnbull; that this application is made at the instance and on behalf of the corporation, and

at their cost and charge, and by their authority, in confirmation of which he annexed two resolutions passed by the present council, and which confirm his statement.

*Henderson* supported the rule.

DRAPER, C. J.—It has not a very favourable appearance that the members of this corporation, elected in January 1859, should, after their successors have been elected, without, as it would seem, any previous proceeding, and at their very last meeting, introduce and pass a by-law to authorise the purchase of a site for a town hall, and the issue of a debenture of \$900 to pay for it out of the taxes to be raised by and under the authority of their successors. No doubt to purchase a site for a town hall is a matter within the competence of the township council, but if it was a matter of urgency to obtain such site, it appears strange that it should have been delayed to the last moment, and if it was not, it would have been both fair and wise to have left it to their successors, who would have to provide ways and means to pay for it.

But whatever the necessity or motive for passing this by-law, all we have to do is to determine whether it has been so passed as to be valid and binding.

It appears to me too clear for argument that the second clause of this by-law is bad, and the two are so connected that I do not see how to separate them. It was not intended to pay immediately for the property to be purchased. Authorising the purchase, therefore, was, it seems to me, undeniably contracting a debt, and the second section authorised the issue of a debenture, as the evidence of that debt, and with the intention of securing payment to the vendor. The words at the conclusion of the by-law put this beyond doubt or denial, “said debenture *to be paid* out of the taxes of the year of our Lord one thousand eight hundred and sixty.” Then the requirements of section 223 of the Municipal Corporation Act as to by-laws of this character have not been complied with, though this by-law comes within its provisions.

I think the rule should be made absolute with costs.

*Per cur.*—Rule absolute.

## GRANT v. McMILLAN.

*Distress—By Agent in his own Name—Ratification of by Principal.*

A distress made by an agent for the benefit of his principal, in his own name instead of his principal's, and subsequently ratified by the principal, *held* legal.

TRESPASS for breaking and entering the W.  $\frac{1}{2}$ , No. 23, 1st concession Charlottenburg, and taking cattle.

*Pleas*—1. Not guilty by statute Geo. 2, ch. 19, sec. 21. 2nd. Close not plaintiff's. 3rd. Goods not plaintiff's.

The trial took place at Cornwall in November 1860 before the *Chief Justice* of Upper Canada. It appeared during the progress of the cause that Alexander McKenzie Grant, the son of the plaintiff, was the devisee for life of the west half of No. 23, 1st concession Charlottenburg, and lived together with the plaintiff thereon. It was further shewn that there were executions against the lands of the son, and on the 2nd May 1859 he wrote a letter to one Duncan McDonell requesting him to purchase his right to the land at sheriff's sale, and that he would pay him rent at the rate of £20 per annum, payable half-yearly in advance, and it was admitted that the land was sold to Duncan McDonell by the sheriff, though the sheriff's authority to sell was not admitted or proved. It further appeared that on the 27th June 1859 Alexander M. Grant, the devisee, by deed of that date, in consideration of £150, conveyed to Duncan McDonell the same premises, *habendum* in fee.

Under these circumstances the defendant issued a warrant to one Hiram Pitts, to distrain the goods of Alexander McKenzie Grant "in the house he now dwells in on my farm which he now occupies, being the west half of lot number twenty-three in the first concession of the township of Charlottenburg, in the county of Glengarry, for the sum of twenty pounds, being the amount of rent due me for the same up to the 6th day of May 1860 next, and for your so doing this shall be your sufficient warrant and authority." Dated 28th February 1860, and signed by the defendant.

Upon this warrant the plaintiff's cattle, &c., were seized upon the premises. Duncan McDonell afterwards ratified the bailiff's acts under this warrant, and the act of the defen-

dant in issuing it. It was proved by the bailiff that the defendant acted as the agent for Duncan McDonell, and in that character had authorised other distresses on other occasions.

The learned Chief Justice treated it as clear that Alexander M. Grant became tenant to Duncan McDonell, and therefore that he could not dispute *his* title, and that the plaintiff, living with his son Alexander M. Grant, could not bring the title in question, but if his goods were distrained upon for his son's rent he must seek indemnity from the hands of the son.

But inasmuch as the defendant had issued a warrant to distrain in his own name, treating Alexander M. Grant as *his* tenant, and claiming the rent as due to himself, he reserved leave to the plaintiff to move to enter a verdict for him for £25, the amount of damages assessed by the jury, and under the authority of *Wootley v. Gregory*, 2 Y. & J. 536, and of *Trent v. Hunt*, 9 Exch. 14, he directed a verdict for the defendant.

In Michaelmas Term *McMichael* obtained a rule *nisi* accordingly. He urged also that he was entitled to a rule on another point raised at the trial, namely, whether there was evidence to go to the jury of a demise from Duncan McDonell to Alexander McKenzie Grant; but there was no statement of the objection on the notes of the learned Chief Justice, and on referring to him he stated that he had no recollection that the point had been raised.

*J. S. Macdonald*, Q. C., shewed cause, and

*McMichael* supported his rule, citing *Dunk v. Hunter*, 5 B. & Al. 322; *Fitzmaurice v. Bayley*, 4 J. N. S. 506; *Trent v. Hunt*, 9 Ex. 14.

DRAPER, C. J.—The case seems to be governed by *Wootley v. Gregory* and *Trent v. Hunt*. Although the distress was not made in the name of McDonell, it appears to have been made for his benefit; that the defendant was McDonell's agent, and had been in the habit of collecting

his rents, and that McDonell subsequently adopted and ratified this distress as made for his benefit.

We think therefore the rule must be discharged.

*Per cur.*—Rule discharged.

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### SMITH V. CLUXTON.

*Boundaries—Notice of title—Limited to at trial.*

A line run without legal authority between lots 5 and 6, and acquiesced in for years, was subsequently found to be erroneous, and a new line was run according to law, which took away land from the supposed lot 5 and added to 6. Plaintiff in this action sought to recover the said land so taken, which was clearly a part of lot 6, claiming right by possession, though his grantor never pretended to have any right thereto, and he did not claim by possession in his notice.

*Held* that plaintiff in his notice not having set up a possessory title, is debarred from doing so at the trial.

EJECTMENT for that part of No. 6, 1st concession Thurlow, lying between the old and new west-side lines of said lot, and situate north of the main travelled road leading from Belleville to the second concession of Thurlow, and east of the main travelled road leading from Belleville to Canniffe's mills. Also for that part of No. 5, 1st concession Thurlow, lying on the west side of the road from Belleville to Canniffe's mills, and lying east of the commissioners' line between lots No. 5 and 6 in the first concession of the township of Thurlow.

Also for that part of No. 5, 2nd concession of Thurlow, now in the town of Belleville, lying north of the main travelled road leading from Belleville to the 2nd concession of Thurlow, and lying east of the main travelled road from Belleville to Canniffe's mills.

One of the defendants (O'Neill) defended for a part lying in the town of Belleville, commencing easterly of the road leading to Canniffe's mills, at the north-west corner or limits of a piece of land lately purchased of Nelson G. Reynolds (another defendant) from one Samuel Ross, and known as the Huff\* property, thence running along the northern line of said land easterly to the centre or half-way between the

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\* NOTE.—The real name appears to be "Hough," but in the course of dealings it has been spelt both ways.

road leading from Canniffe's mills and the road leading to the second concession ; thence at a right angle with said northern line  $22\frac{1}{2}$  feet, thence westerly parallel with said northern line to the westerly limit of said land ; thence northerly along said westerly limit 25 feet to the place of beginning ; also for a small gore of land lying west of the road leading to Canniffe's mills, and north of the premises owned by Mr. Alford in the town of Belleville.

A verdict by consent was rendered for the defendant Mary Foy.

Defendant Nelson G. Reynolds defended for that part of lot number six, 1st concession of Thurlow, in the county of Hastings, now included in the town of Belleville, lying between the old and new west-side lines of said lot, and situate north of the main travelled road leading from Belleville to the 2nd concession of Thurlow, and east of the main travelled road leading from Belleville to Canniffe's mills, excepting that portion heretofore sold by defendant Reynolds to O'Neill.

The plaintiff took judgment for all not defended for.

The plaintiff's notice of title was under a deed dated 26th January 1850, made by Jacob Doxstator and Catherine Doxstator to himself, and under an indenture of bargain and sale, dated 22d April 1848, made by Jacob Doxstator and Catherine Doxstator to himself (Joshua Smith) ; also by an indenture of bargain and sale made by one Gershoun Read to himself (plaintiff), dated 31st January 1850 ; also by an indenture of bargain and sale, dated 12th December 1854, made by Jacob Jones to plaintiff.

The defendant O'Neill's notice of title was under a deed of bargain and sale from Nelson G. Reynolds to himself, dated 23d November 1855, and by forty years' adverse possession by him, and those through whom he claimed.

The defendant Reynolds claimed title under the following deeds :—

1. Patent issued to John Singleton.
2. Deed from John Singleton to John Canniffe.
3. Deed from John Canniffe to William Hough.
4. Deed from William Hough to Harvey Rowley.

5. Deed from Harvey Rowley to Samuel Ross.

6. Deed from Samuel Ross to himself, Nelson G. Reynolds, and by boundary line commissioners' report upon the lines of the lot in 2nd concession of Thurlow. (Query, if *first* be not meant.).

The trial took place at Belleville in November 1860 before *Burns, J.* The plaintiff put in the will of John Walden Meyers, dated before 1822, whereby he willed and bequeathed all the remainder of his property, both real and personal, goods and chattels, lands and tenements, to his grandchildren, males and females, share and share alike.

Next a deed dated 17th March 1842, which recited an agreement for partition among the grandchildren, and that certain lands in the deed mentioned had been set apart to certain of the grandchildren to hold as tenants in common, and that the parties to the indenture had agreed to make partition according to the intention of the agreement, and that by that apportionment that part of No. 5, 1st concession of Thurlow, east of the river Moira, of which John Walden Meyers died seised, was set apart and agreed to belong to certain of the parties to that indenture of the second part, and the parties of the first part did convey to the parties of the second part in fee, among other things, that part of No. 5, 1st concession Thurlow, described thus, commencing where a stone monument marked W.R. had been planted on the north side of the street leading from Belleville to the 2d concession of Thurlow. Then N. 21° W. to the centre of the river Moira, thence northerly along the centre of the river until it intersects the side-line between Nos. 5 and 6 in the 1st concession, then along that side-line until it intersects the most easterly road leading from Belleville across lot No. 5 to the 2nd concession of Thurlow, then along that road on the north side thereof to the place of beginning. This is the only piece of land described in that deed that is affected by the present suit.

3rd. A deed from Jacob Jones (one of the grantees in the deed of 17th March 1842) to the plaintiff, dated 4th October 1854, of part of number 6, 1st concession of Thurlow, "as the same is now known according to the line run between

lots numbers 5 and 6, and before the running of the new line known as part of No. 5," described as "commencing at a post planted at the N. W. side of the travelled road leading from Belleville aforesaid to the second concession of the said township of Thurlow, which post was planted in the old line between said lots by John Canniffe, the former owner of the said lot No. 6, when making a sale of the said portion of the said lot to one William Huff, and then planted at the southwest angle of the land then sold to said William Huff, thence northerly following the said old line until it intersects the road leading from Belleville aforesaid to Canniffe's mills, then southerly following said road until it intersects the new line between said lots five and six, then southerly following the said new line to the road first mentioned as leading from Belleville to the 2nd concession of Thurlow, then easterly along the said road to the place of beginning.

4th. A deed from said Jacob Jones to plaintiff, dated 12th December 1854, for part of lots Nos. 5 and 6, 1st concession of Thurlow, described thus—"Commencing on the north side of the road which leads from Belleville to the second concession of Thurlow, at a point where the line between lots 5 and 6, in the 1st concession of Thurlow, known as the old line between the said lots, intersects the said road, then westerly following the said road until it intersects the road leading from Belleville to Canniffe's mills to a point in said lot No. 5, then along the south and east side of the said road leading to Canniffe's mills until it intersects the line between said lots 5 and 6, known as the new line between said lots, then following the said new line northerly along the course thereof until it intersects the south-west angle of ten acres of said lot number six, sold by the late John Canniffe to one John Emmerson Sleeper on the said new line, then easterly, parallel with the rear line of said lot number six, to a place known as the old line between said lots, thence southerly following the said old line to the place of beginning." This description covers all the land described in the deed of 4th October 1854, and also a small triangular piece of land adjoining the south-western portion thereof, and which triangular piece is a part of number five, according to the new line.

5th. A deed dated 26th January 1850, from Jacob Doxstator and Catherine, his wife, to plaintiff (the grantors being two of the grantees in the deed of 17th March 1852). The description is not very clear, but the deed professes to convey a part of lot number six, in the first concession of Thurlow, but according to the description it conveys no land west of the new or commissioners' line, excepting the small triangular piece of land described in the deed of 12th December 1854, and being part of number five, according to that line.\*

6th. A deed from Gershon Reed to the plaintiff, dated 31st January 1850, of all the estate, &c., of the grantor in part of Nos. 5 and 6, 1st concession of Thurlow, with a description (not accurate in words) like that in the deed of 26th January 1850.

7th. A deed dated 22nd April 1848, from Jacob and Catherine Doxstator to plaintiff, of all their estate, &c., of an undivided part of No. 5 and 6 in the township of Thurlow. The only part of the description material to this case is as follows:—"Commencing on the division line between lots Nos. 5 and 6, on the north side of the second concession road, thence running south-westerly until it intersects the river road leading to Canniffe's mills, thence along said road until it strikes the division line between lots 5 and 6, thence southerly to the place of beginning, consisting of part of lot number five, in the 1st concession of Thurlow.

8th. A deed dated 30th May 1835, from John Canniffe to William Hough, of part of number six, 1st concession Thurlow, described as "commencing on the division line between lots five and six, 1st concession of Thurlow, and on the north side of the road leading from Belleville to the second concession of said township, thence north sixteen degrees west, six chains and three links along said side-line, thence S. 60°, 30' E. 4 chains 83 links, more or less, to the above mentioned road, thence S. 39° W. 4 chains 16 links along said road to the place of beginning."

9th. A deed dated 28th December 1841, from William

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\*NOTE.—This conveyance passes only all the estate and interest of the grantors in the premises described.

Hough to Harlow Rowley of part of number six, 1st concession of Thurlow, described as in the last deed.

10th. A deed dated 5th April 1845, from Harlow Rowley to Samuel Ross, of the premises described in the two last foregoing deeds. The plaintiff then called one Emmerson, a surveyor, who proved that before Hough sold to Rowley, he (Emmerson) planted a stone monument at the south-east corner of the land (one acre) conveyed by Canniffe to Hough on 30th May 1835. In that year the only line known between Nos. 5 and 6 was the old line, and the line was traced through and marked on the ground. He swore that up to the time of the commissioners' survey the parties acted upon the old line; that Hough was never in possession of the piece of land in dispute according to the commissioners' lines, neither was Doxstator or the parties who made the deeds to the plaintiff.

Another witness stated that he had known the old line 43 years, and that Capt. Meyers (the grandfather) pointed it out to him; that there was a fence partly of rails and partly of brush on it, north of the old road leading to the second concession across the ravine; that the division fence came to this road, and the whole line between lots five and six had a fence, except the piece in a swamp about 400 yards wide, which fence extended to an old bridge.

It was further proved that the division of 17th March 1842 was made according to the old line, and after the partition deed possession was taken. But a division into lots was made in 1843 or 1844, according to the commissioners' line. The land in dispute lies in the ravine, and the old bridge is on it, and the remains of an old causeway. The fence followed along by the road—it was so as far back as 1814. The fence ran up from one Dexter's, along the old road, and that was said to be the old line. The new road is east of the old fence. There was no actual possession, that is, no possession but that which would be given by law, of this piece of land by those under whom the plaintiff claimed.

In 1835 or 1836 Hough, as was sworn, asked permission of one of the Jones' family to put his horse to pasture on a small piece of the land in dispute. He fenced in his acre

according to the old line. The boundary line commissioners established the line in 1841. The new road was laid out in 1832, at a distance of about 80 links from the causeway, which causeway is 40 or 50 links distant from the commissioners' line.

On the defence was put in a deed, dated 23rd November 1855, from Nelson G. Reynolds to Francis O'Neill, of a piece of land described thus:—commencing easterly of the road leading to Canniffe's mills at the north-west corner of a piece of land lately purchased by Reynolds from Samuel Ross, and known as the Ross property; thence running along the northern line of said land (easterly) to the centre or half way between the said road leading from Canniffe's mills and the road leading to the second concession, thence at a right angle with said northern line  $22\frac{1}{2}$  feet, thence westerly, parallel with said northern line to the front or westerly limit of said land, thence northerly along said front or westerly limit 25 feet to the place of beginning.

And an exemplification of a judgment in ejectment brought by the present plaintiff against Reynolds to recover part of lots Nos. 5 and 6, 1st concession Thurlow, embracing the piece of land now in suit, and the small triangular piece of land which is part of number five, according to the commissioners' line, and in which the plaintiff recovered the triangular piece only. This judgment was entered on the 28th July 1858.

By consent a verdict was taken for the defendants, with leave to the plaintiff to move to enter a verdict for him upon the construction of the deeds and evidence, if the court were of opinion he should succeed. The defendant to have the benefit of the objection that plaintiff should have stated in the notice of claim that he relied on possession to support his title, and any other objection arising upon the deeds and evidence.

In Michaelmas Term *Wallbridge*, Q. C., obtained a rule *nisi* to enter a verdict for the plaintiff on the leave reserved.

*Henderson, J. E.*, and *Ponton*, shewed cause, and cited the 222 clause of the Com. Law Pro. Act.

*Wallbridge*, in support, referred to *Coltman v. Brown*, 16 U. C. Q. B. 133; *Wideman v. Bruel*, 7 C. P. 134.

DRAPER, C. J.—The right of Jacob Walden Meyers to No. 5, 1st concession Thurlow, was not contested at the trial. Before 1822 he devised this lot, with other lands, to his grandchildren as tenants in common in fee.

Under a deed of partition, a part of this lot became the property of certain of the grandchildren, by a description which refers to the side-line *between Nos. 5 and 6, in the 1st concession*, as one of the boundaries of the part of number five conveyed by that deed, and in the course of the trial it became fully apparent that neither John W. Meyers, nor his devisees, had any title by deed, will, or other instrument of conveyance, to any part of lot number six.

But it appeared that many years before this partition, which was made in 1842, though at what precise time was not shewn, a line had been run and marked on the ground, designating as far as it extended the division between lots Nos. 5 and 6. There was nothing to shew by whom, nor at whose request, this line was run. It was, however, the only line run or known as dividing these two lots, or such part of them as it divided, until 1841, when the boundary line commissioners established a different line as the true limit between them.

The land claimed in this action is, beyond dispute, a part of number six, according to the decision of the boundary line commissioners, and the writ of summons claims a part of number six lying between the old and new west side lines of that lot, and north of the main travelled road from Belleville to the second concession of Thurlow, and east of the main travelled road from Belleville to Canniffe's mills, and another part of number six lying on the west side of the road from Belleville to Canniffe's mills lying east of the 'commissioners' line between lots five and six.

The notice of title given by plaintiff in compliance with 222 section of the Common Law Procedure Act of 1856, was under four conveyances, three of which were proved at the trial. They were all dated in or since 1848. He

also gave evidence to establish acts of ownership and of possession on the part of the former owners of number five, in order to set up a title by length of possession of the portions of number six claimed in the action. Neither of the parties who conveyed to the plaintiff, nor the plaintiff, were proved ever to have been in possession of these portions. On the defence it was objected that it was not competent for the plaintiff, under the notice of title given, to set up any title except one by conveyance.

The section of the statute referred to requires a claimant in ejectment to give notice of "the nature of the title intended to be set up by him, as, for example, by grant from the Crown, or by deed, lease, or other conveyance derived from or under the grantee of the Crown, or by marriage, descent, or devise, stating to or from whom, or by length of possession or otherwise, as the case may be, according to the nature of the claimant's title," "and such notice shall not contain more than one mode in which title is set up without leave of the court or a judge, and at the trial the claimant shall be confined to proof of the title set out in the notice."

The plaintiff contended that inasmuch as the length of possession on which he relied was not a possession held by himself, or even by those who conveyed to him, but of other parties through or under whom his grantors derived title, it was open to him under the notice given to prove it in support of his claim. The evidence was received subject to the objection.

Upon consideration I think the objection should have prevailed. The principal, if not only, object of this section appears to me to be, to apprise the defendant of the title on which the claimant means to rely, so that he may prepare his defence accordingly and avoid the expense of unnecessary witnesses, &c. In the present case, if the defendant had a right to assume that the claimant was relying on a paper title, he would not prepare to resist a claim founded on length of possession, and the less when "length of possession" is one of the modes of claiming title referred to in this section, and which cannot be joined with any other mode without leave.

If the object of the legislature was to save trouble and expense, and to bring up the real question in dispute, with reasonable certainty on both sides, the enactment should, in my humble judgment, receive a construction calculated to produce such results. I think that to hold that a claimant who sets up in his notice of title nothing more than a conveyance from A. B., is at liberty under that notice to prove title in A. B. by any one or more of the various modes by which title may be established, would be to give to the statute a narrow and unprofitable construction, and would tend to defeat the spirit by a too rigid adherence to the letter. In my view, the notice should state the line of title on which the claimant relies, going as far back as is necessary to establish the claimant's right; for example, in the present case, after stating the deeds on which he relies, shewing how the grantors therein were entitled, whether by deed, devise, or length of possession, otherwise the notice is really valueless as a means of obtaining what I think the legislature intended.

In *Coltman v. Brown*, 16 U. C. Q. B. 134, that court seems to have held a different opinion, but the case does not appear to be rested on that point. Laying this objection aside, however, I do not think the plaintiff is entitled to recover.

This is not a case of mere disputed boundary. There is no ground to contest the position of the side-line between lots No. 5 and 6, for the boundary line commissioners determined that in 1841. If at all, it is only by virtue of an actual or implied possession—a possession in fact or in law—that the plaintiff can recover.

None of the parties who conveyed to the plaintiff are shewn ever to have been in possession. The title to number five would draw to it no possession beyond the legal limits of that lot. It is true that for many years an erroneous opinion or belief prevailed with all parties, so far as appears, as to the position of the side-line, the line of demarcation between these lots, but the evidence fails to shew a possession in fact, on the part of the former owners of lot number five, of any part of the land now claimed by the plaintiff, or that the old line was established by convention and agree-

ment between the owners of Nos. 5 and 6, as the boundary between their respective lands, no matter where the real boundary should really be. The evidence is negative that no line was known but the old line until 1841—not positive that the old line was adopted as the settled boundary, or that parties on each side occupied on either or both sides up to it for a sufficient time to give them a right.

The case resolves itself into this. A line was run without legal authority intended to mark the division between these lots, which line was for many years assumed to be correct. In 1841 this line was proved to be erroneous, and the true line was ascertained. The plaintiff, since that time, beginning in 1848, has purchased the land now in dispute from parties whose only right is as devisees of John W. Meyers, who was proprietor of lot number five. The land in dispute is clearly part of number six. None of the vendors to the plaintiff were ever in actual possession of it, nor has any continuing possession been proved by any person through whom these vendors derive title; but the plaintiff sets up that because the owners of number five, being in occupation of that lot, claimed that it extended to the old line, and believed that line to be their eastern limit until the true line was established, they are to be held to have had possession up to that line in the same way as they would have been held if their title-deeds had actually covered it, and that he, the plaintiff, can now recover it as part of number six, although neither John W. Meyers nor his devisees had, nor pretended to have, any title to this last named lot. It is in effect an attempt to overturn the commissioners' line, and to substitute the old and erroneous line for it, made by a man who purchased the land long after the line was established by legal authority contrary to what he now claims.

In my opinion the rule should be discharged.

*Per cur.*—Rule discharged.

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## CULLEN V. NICKERSON.

*Covenant—Execution of by individuals—Intended as corporate—Condition precedent.*

Where four parties, described not by their own names and personal descriptions, but as a collective body not shewn to be corporate, signed and sealed a deed with their own names and seals, they were

*Held* to be individually bound.

Upon a covenant to pay, in consideration of certain work to be performed, the first payment to be made before the time fixed for the completion of the contract,

*Held* that the performance of the work was not a condition precedent to payment.

WRIT issued on the 7th of January 1860 against Moses C. Nickerson, James F. Fish, George Wilson, and J. Fluelling.

*Declaration* stated that defendants, trustees of the Wesleyan Methodist parsonage, covenanted under seal to pay to the plaintiff \$533<sup>33</sup>/<sub>100</sub> on the 1st of January 1859, and the like amount on the 1st of January 1860, which time had elapsed before the commencement of this suit, but the defendants did not pay, &c.

Common counts.

*Pleas*—1st, *non est factum*. 2nd, never indebted. 3rd, except as to \$533, 33, part of the money claimed, payment. 4th, except as to \$533, 33, other portion of plaintiff's claim, set-off. 5th, and as to so much of the first count as alleged the breach of the defendant's covenant to pay the sum of \$533, 33, on the 1st of January 1860, the defendants say that by the agreement in the said first count mentioned the plaintiff did covenant and agree with the defendants that he, the plaintiff, would, on or before the 1st of July 1859, in a good and workmanlike manner, and according to the best of his art and skill, well and substantially erect, build, set up, and finish a house or parsonage, according to the plans and specifications in the said agreement in the first count mentioned in every particular; and the defendants further say that the erection, building, setting up, and finishing of the said house or parsonage was and is a condition precedent to the liability of the defendants to pay the said sum of \$533, 33 to the plaintiff, and to the right of the plaintiff to ask or receive the same from the defendants. And the

defendants further say that the plaintiff hath not erected built, set up, or finished said house or parsonage, but therein hath wholly failed and neglected.

*Joinder* of issue as to the 1st, 2nd, and 3rd pleas, and to the 4th never indebted; and as to the 5th, that the erection, building, &c., was not nor is a condition precedent to the defendants' liability to pay plaintiff, &c.

Joinder of issue by defendant to replication of plaintiff.

This action was tried at the last spring assizes for the county of Norfolk before *McLean*, J. At the trial the following document was put in evidence on the part of the plaintiff:—

“This contract, made this 20th day of September 1858, by and between the trustees of the Wesleyan Methodist parsonage in the town of Port Dover, in the county of Norfolk of the province of Canada, of the first part, and John Cullen, of the town of Port Dover, in the county and province aforesaid, contractor, of the second part, Witnesseth that the said party of the second part hath, for and in consideration of five shillings to him in hand paid, the receipt whereof is hereby acknowledged and confessed, and for the consideration hereinafter mentioned, doth covenant, promise, and agree to and with the said parties of the first part, that he, the said party of the second part, will, on or before the 1st day of July 1859, in a good and workmanlike manner, and according to the best of his art and skill, well and substantially erect, build, set up, and finish one house or parsonage according to the plan and specification of said parsonage in every particular: In consideration whereof the said parties of the first part do covenant and promise to and with the said party of the second part to pay, or cause to be paid, unto the said party of the second part, the sum of \$1600, at the times and in the manner following, *id est*:— The sum of \$533, 33, to be paid on the 1st of January next, and a like sum of \$533, 33, to be paid on the 1st of January 1860, and a like sum of \$533, 33, to be paid on the 1st of January 1861. All articles for the said building furnished by the said parties of the first part to be received by the said party of the second part, and at such prices as they can be obtained for, and be allowed as part payment by him the said party of the second part. And for the fulfilment of all the promises and covenants aforesaid by each of the parties, they respectively bind their legal representatives as well as themselves.

"In witness whereof the said parties to these presents have hereunto set their hands and affixed their seals the day and year first above written." Signed and sealed by plaintiff and defendants.

Upon which contract plaintiff claimed the first two instalments. The defendants objected—1st, That the action had been improperly brought against them as individuals, and should have been brought against them as a corporation or as trustees.

2nd, That the finishing of the building in the contract named was a condition precedent to the defendant's liability to pay the said instalments.

A verdict was taken subject to the opinion of the court on these points, and if judgment for plaintiff, verdict to be increased or diminished by the award of William Salmon, Esq., judge of the county court of the county of Norfolk.

The case was argued by *McMichael* for plaintiff, citing *Berkeley v. Hardy*, 5 B. & C. 355; *Cooch v. Goodman*, 2 Q. B. 580; *Metcalf v. Rycroft*, 6 M. & S. 75.

*M. C. Cameron*, contra, cited *Nurse v. Frampton*, 1 L. Rayd. 28; *The Master, &c., of Sussex College v. Davenport*, 1 Wilson 184; *Elliott v. Davis*, 2 B. & P. 339.

DRAPER, C. J.—We cannot take judicial notice that there is not such a corporate body as "the trustees of the Wesleyan Methodist parsonage in the town of Port Dover, in the county of Norfolk of the province of Canada."—(*Cooch v. Goodman*, 2 Q. B. 580.) And therefore if the execution of this deed had been under a corporate seal without any signatures, or even with signatures purporting to be signed by officers of the corporation, and as such merely in discharge of their official duty, this action would fail. But this case is distinguishable. The execution of this deed by the defendants is, I think, plainly no execution in a corporate character as by a corporation. The "*in testimonium*" is, the said parties have hereunto set their hands and affixed their seals, and the four defendants sign their names each opposite a separate seal. This mode of execution repels the

idea that the deed was intended to be, or purports to be, executed by a corporation ; and the preceding clause leads to the same conclusion, because “for the fulfilment of all the promises and covenants aforesaid by each of the parties they respectively bind their legal representatives as well as themselves.” And I think we may fairly intend this to mean the same thing as if the words “executors and administrators” had been used, for if the trustees were a corporate body, having perpetual succession, such words as “legal representatives would not have a proper application, since although the individuals presently composing the corporation might be changed and successors to them appointed, the corporation as a covenanting party would be the same, and be bound immediately, and not mediately, in the person of any representative.

I think, therefore, the question is, whether individuals described not by their own names and personal descriptions, but as a collective body not shewn to be corporate, who sign and seal a deed with their own names and seals, are not individually bound?

It certainly was an oversight in preparing this as a special case that it should not be stated, as I have no doubt the fact is, that the defendants are not in law a corporation ; I assume that they are not, and if it be otherwise it should be made a part of the case. It is not necessary in order to bind a party to a deed that he should be named in the premises if he be named in the body of it, and the deed be not expressed to be made between some other persons as the parties to it, as in *Nurse v. Frampton* (1 Lord Raymond 28 ; 1 Salk. 213), where the deed began—“It is agreed that,” &c., not saying by or between whom it was agreed, and plaintiff and defendant executed it, it was held that plaintiff might sue defendant upon it, the deed shewing in the body of it things to be mutually done between plaintiff and defendant. A comparison of this authority with *Scudamore v. Vandestine* (2 Inst. 673, reported also under a different name in *Cro. El.* 56), shews, I think, sufficiently a distinction which will enable us to hold the execution by these defendants is an adoption of the name in the deed,

as their description, namely, Trustees of the Wesleyan Methodist parsonage. If a deed poll began, "I, the undersigned, one of the trustees named in a certain deed" (describing it), "hereby bind myself to pay to," &c., and a party executed it, or, "We, the undersigned co-partners, in the form of B. & Co., bind ourselves to pay," &c., and four persons signed and sealed it—in either case I apprehend the several parties signing and sealing would be bound. The maxim *ut res magis valeat* would, I think, govern the court in so deciding. I think, therefore, the first objection fails. As to the second point, as I read this agreement, the covenant of the defendants is to pay money in consideration of the covenant of the plaintiff to build a house. Such is, I think, the natural construction of the language of the deed, and it is strengthened by the consideration that the first payment was covenanted to be made before the time fixed for the finishing the house would arrive.

I think, therefore, the plaintiff is entitled to the *postea*.

*Per cur.*—*Postea* to plaintiff.

See *Salter v. Kingly*, Carthew, 76-7; *Salter v. Kingly*, Holt 211, Shower 58; *Nurse v. Frampton*, 1 Ld. Rayn. 28, 1 Salk. 214; *Goodman v. Knight*, Cro. Jac. 359; *Green v. Horne*, 1 Salk. 197; *Cooch v. Goodman*, 2 Q. B. 580; *Berkeley v. Hardy*, 5 B. & C. 355; *Metcalf v. Rycroft*, 6 M. & S. 75; Roll. Abr. 519; Hard 178; Bacon's Abr. Grant C.

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The following gentlemen were called to the bar during this term:—JEHIEL MANN, J. SAMUEL GEORGE WOOD, THE HONOURABLE LEWIS THOMAS DRUMMOND, JOHN BAN MACLENNAN.

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# DIGEST

OF

CASES REPORTED IN VOL. X., BEGINNING HILARY TERM,  
23 VIC., ENDING MICHAELMAS TERM, 24 VIC.

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## ABSTRACT.

*Patent—Title.*—*Held* that the production of an abstract of the registries upon a lot, shewing the granting by the Crown of a patent, is not sufficient evidence of title to maintain an action of dower, without the production of an exemplification of the patent. Is an abstract receivable in evidence at all if objected to? *Reed et ux v. Ranks*, 202.

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## ACCEPTANCE.

*Of bill of exchange by a railway company.*—*See* BILL OF EXCHANGE, 1.

*Of contract for sale of land.*—*See* CONTRACT, 2.

*Of work under contract.*—*See* CONTRACT, 4.

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## ACTION.

*Against surety on bond.*—*See* BOND, 4.

*On policy of insurance—In whose name it must be brought.*—*See* POLICY.

*Of seduction—Survival of to administrator.*—*See* SEDUCTION.

*Against a married woman.*—*See* MARRIED WOMAN.

## ADMINISTRATOR.

*Survival of action of seduction to.*—*See* SEDUCTION.

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## AFFIDAVIT.

*See* TROVER, 1.

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## AGENT.

*See* POLICY—EJECTMENT, 6.

*Distress by, in his own name.*—*See* DISTRESS.

*Fraudulent representation of being—Damages therefor.*—*Held* that a person who induces another to contract with him as the agent of a third party by an unqualified assertion that he is such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue, and held further, that costs incurred by such third person for the recovery of damages in an action against the supposed principal, may be recovered as damages in an action against such unqualified agent. *Eckstein v. Whitehead*, 65.

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## AGREEMENT.

*Verbal, for purchase of land.*—*See* COMMON COUNTS.

*To furnish steam power.*]—See LEASE, 4.

### ALIEN.

*Forfeiture of estate by*—Under statute 54 Geo. III., ch. 9—Crown.]—Where a party who owned real estate in more counties than one, and voluntarily left Upper Canada in 1812 to reside in a foreign country, *Held* that under the statute 54 Geo. III., ch. 9, it was not necessary to appoint a commission to enquire into the facts in more than one county, and a commission having been issued to one county, which was not traversed within the time allowed by law, and which declared the party into whose *status* it was issued to enquire to be an alien under the terms of the statute, all lands in Upper Canada became thereby forfeited. *Held* also, that the ancestor of the plaintiff, through whom he claimed by devise, being under the circumstances above mentioned declared an alien, he was unable to hold land within the province, and could not therefore devise the same, and that his lands upon office found became vested in the Crown. *John Washington Wallace v. James Adamson*, 338.

### ALLOWANCE.

*Of securities of division court clerk.*]—See DIVISION COURT.

### APPEAL.

See BILL OF SALE, 1.

*From division court.*]—See TROVER, 2.

### APPROPRIATION.

*Of money.*]—See PAYMENT.

### ARBITRATION.

See SCHOOL, 3, 4.

*Reference to.*]—See REPLEVIN.

*Revision of taxation—Costs of reference.*]—It having been agreed by the parties on the trial that if certain facts left to the jury should be found for plaintiff, the matters of account were to be referred, no mention having been made as to costs; the jury found for plaintiff. On motion for revision of taxation by master (he having allowed the costs of the arbitration), *Held* that the costs of reference were costs of the cause. *Ruttan v. Boulton et al.*, 417.

### ASSIGNOR.

*Employment of under an assignment for benefit of creditors.*]—See ASSIGNMENT, 3.

### ASSIGNEE.

*Right of to intervene.*]—See ASSIGNMENT, 2.

*Of bond to sheriff.*]—See BOND, 3.

### ASSIGNMENT.

*Of bond for deed.*]—See MISDEMEANOUR.

1. *For benefit of creditors—Consideration—Trusts—Registry.*]—A. on the 4th of January 1858 executed a deed of his real estate, purporting to convey it absolutely to the defendants, in consideration of five shillings; this deed was not executed by the defendants, and was registered on the 6th January 1858. On the 5th January 1858 A. executed a deed of assignment for the benefit of creditors generally, which deed was executed by the defendants and other creditors of the assignor, but was not registered, and in the latter deed the trusts, on

which the real estate was conveyed by the former one to the defendants were fully declared. *Held*, the conveyance being impeached on the ground of fraud, that it was competent to those upholding a transaction such as this to show the existence of considerations other than the five shillings expressed in the deed, although the common words "and for other considerations" be omitted. *Held* also, that a clause of release did not in a case like this render the deed fraudulent and void. *The Bank of Toronto v. Eccles et al*, 282.

### ASSIGNMENT.

2. *Attaching order—Right of assignee to intervene.*—Judgment was recovered by B. & Co. against defendant, against whom plaintiff afterwards likewise recovered judgment; B. & Co. put the first *fi. fa.* into the hands of the sheriff against defendant's goods. Then plaintiff put a similar writ into the sheriff's hands, who shortly after the receipt thereof returned it *nulla bona*. Plaintiff then obtained an order for defendant's examination touching debts due to him, &c., and very shortly after being served with such order defendant assigned his book debts, accounts, and claims to B. & Co.; a few days after, plaintiff obtained the usual order to attach debts due to defendant, but it was not shewn that any summons issued calling on the garnishees to pay to plaintiffs the sums they owed to defendant. B. & Co. applied to set aside the attaching order. *Held* that they had no right to intervene in the cause, and that they could not raise the question of the validity of the assignment to them on such an application. *Rettinger v. McDougall*, 395.

3. *For general benefit of creditors*

—*Employment of assignor under—Release clause.*—*Held* that an assignment (duly filed) for the general benefit of creditors, containing a power for the employment of the assignor in the winding up of the business, giving those a share who should execute, without any limitation in time for executing, and containing a release clause, except where the creditors executing should add the words "without release," amounted to a provision for the rateable payment for all the assignor's debts, and was valid. *Feehan v. Lee et al.*, 385.

### ATTACHING.

*Order.*—*See* ASSIGNMENT, 2.

### ATTORNEY.

*And client—Costs between.*—*See* COSTS.

### AWARD.

*Uncertainty in.*—*See* REPLEVIN.

### BAILIFF.

*Of division court—Liability of clerk to, for fees collected.*—*See* SURETY, 1.

### BANK (COMMITTEE.)

*Secretary of—Salary.*—*Held* that a party (sued jointly with others as a member of a committee) is not responsible for the salary of a person employed by the committee (under a joint-stock banking charter) prior to the time of his becoming a stock-holder in the bank and a member of the committee. *Min-gaye v. Burton et al.*, 60.

### BANKRUPT.

*Act 7 Vic. ch. 10—Insolvent—19*

§ 20 Vic. ch. 93.]—Declaration on a promissory note and on common counts. *Plea* by defendant P. C. D., that he had been a trader in Upper Canada within the meaning of the Bankrupt Act, 7 Vic. ch. 10, and since the expiration thereof became insolvent, &c., but not stating that he was insolvent at the date of the passing of the act 19 and 20 Vic. ch. 19, whereunder he filed his petition, and by order of the judge of the county court for the county of Hastings, claimed to be exempt from process, &c., *Held* not sufficient under 19 and 20 Vic., and that the clause in the order, "and it appearing that the said P. C. D., by virtue of the statutes in that case (19 Vic.) made and provided, is entitled to the protection of his person," &c., cannot be construed as an adjudication by the court that the petitioner was insolvent at the time of the passing of the act. *Smith et al v. Dempsey et al.*, 515.

### BILL OF EXCHANGE.

*By railway company—How necessary to be drawn and accepted under* 18 Vic. ch. 182.]—*Held* that a bill of exchange drawn and accepted by certain persons respectively signing themselves secretary and president of a railway company did not come within the 13th section of 18 Vic. ch. 182, as being accepted by the president and countersigned by the secretary, and *held* also that the parties so accepting and drawing were personally responsible. *Bank of Montreal v. Smart et al.*, 15.

2. *Endorsement of—Bill of lading.*]—A. having shipped grain to Oswego, on behalf of one P., to the care of L. W. & Co., draws against it and gives the draft and bill of lading to defendants with the following endorsement on the latter: "Deliver to I. & J. Lewis, Oswego,

subject to a draft drawn by me at 30 days from the 10th of August, for \$2259, 10c. Signed per R. A. G., D. E. McL." The defendants discount the former, and upon acceptance thereof hand over the bill of lading to the acceptors, who fail to pay the bill of exchange at maturity. *Held* that the defendants under the circumstances were not responsible for the loss sustained. *Good-enough v. The City Bank*, 51.

### BILL OF LADING.

*Endorsement of.*]—*See* BILL OF EXCHANGE, 2.

### BILL OF SALE.

1. *Registry—Operation of by relation back to date—Appeal—County court.*]—*Held* that an appeal will lie from the county court to the superior courts upon an interpleader as well as other matters. 2. That the registering of a chattel mortgage does not cause it to operate and have relation back to the day of its date, but takes effect only from its registry; a *fi. fa.* placed in the sheriff's hands between its date and registry would therefore cut it out. 3. That an interpleader issue is to be taken distributively, and the issues found accordingly, and the jury having found an assignment (which was otherwise cut out by a *fi. fa.* placed in the sheriff's hands before registry) was valid on the ground of an immediate delivery and an actual and continued change of possession, the court upheld the verdict. *Feehan v. Bank of Toronto*, 32.

2. *Registry of—Its operation back to date by—Change of possession.*]—*Held* that the registry of a chattel mortgage within the five days from its date, when not accompanied by an immediate delivery, and followed by an actual and continued change

of possession, as required by the act, does not cause it to have reference back and to take effect from its date, nor is it sufficient to pass the property unless it is so filed. The decision in *Feehan and the Bank of Toronto* affirmed. *Shaw v. Gault et al.*, 236.

### BOND.

*For deed.*]—See MISDEMEANOUR.

1. *Possession of land—Ejectment.*]—A. having given to B. his bond in the penal sum of £2500, conditioned among other things that C. and D. should reside on a certain lot of land so long as they conducted themselves in a manner agreeable to A., *Held* that no notice or demand of possession was necessary before commencing an action of ejectment. *Tisdale v. Tisdale*, 106.

2. *Pleading—Period of appointment of treasurer of a township under 12 Vic. cap. 81—Right to impose further taxes without vitiating.*]—The plaintiffs declare on a bond to “the Beverley Municipal Council” (there being no such corporation in existence), the defendants do not deny the making of the bond, but plead over, on demurrer to the plea and objections to the declaration. *Held* that by not pleading “*non est factum*” the defendants were debarred from taking the objection to the form of the bond as pleaded. 2nd. that the appointment of a treasurer under 12 Vic. cap. 81, is an appointment till removed, and not only for a year, and that a plea not averring the office (for the breach in performance of the duties of which the action was brought) to have been an annual one at the time of the taking the bond was bad. 3rd. That the imposition of additional taxes to those assessed at the time of taking the security, and the increase of the

risk thereby, did not vitiate a bond given for the general performance of duties and payment of all moneys. *The Corporation of the Township of Beverley v. Barlow et al.*, 178.

3. *To sheriff—Action by assignees on—Breach—Damages.*]—In an action by the assignees of a sheriff against the securities of one F. for a breach of the condition of a bond that F. should abide and remain within the limits. *Held* that the measure of damages to which the plaintiffs were entitled by reason of the breach was the amount for which the debtor was in custody, with interest thereon, notwithstanding the debtor was insolvent from the time of the arrest until the breach of the condition declared on. *Kerr et al. v. Fullarton et al.*, 250.

4. *Action against surety for breach of—Pleading—misnomer.*]—A plea which stated that a bond (upon which the action was founded) was given for the due performance of the duties of the office of secretary and treasurer of the plaintiffs, and that before any breach occurred, the party, as security for whom the bond was given, was appointed president and director of the said company, *Held* bad, for not shewing that the offices of president and treasurer were incompatible as being under the Consolidated Statutes of Upper Canada, ch. 49, or otherwise; and admitting the offices to be incompatible, did the acceptance of the one as a consequence of law vacate the other? 2nd, that a plea stating that the co-bondsman (as surety for whom the defendant was sued) had ceased to be secretary and treasurer of the company at the time the bond was given, and had become a director and president, but that defendant did not know it, *Held* to contain no answer to the action without the incorporation into and reading

of the bond in the plea, which being done, the recital contained an admission under seal of his being duly appointed treasurer and secretary, and was therefore a contradiction thereof. 3rd, that a bond sued upon in the name of "the Trent and Frankford Road Company," which upon being produced was in the name of the "president and directors of the Trent and Frankford Road Company," came within the decision of the Brock District Council v. Bowen (7 U. C. Q. B. 471) and *In re Hawkins* (2 U. C. C. P. 72), and was sustainable. *The Trent and Frankford Road Company v. Scott Marshall*, 329.

5. *Breach of—Exemplification of judgment—Estoppel by evidence.*]—Upon an action on a bond from one A. C., defendant to S. (sheriff), indemnifying him, &c., by reason of his paying over to A. C. \$390, alleged to be due defendant for rent of the premises on which the goods, out of which the money was made, were seized (the rent not having accrued due at time of seizure), assigning as a breach that defendant did not indemnify, &c., but permitted one J., an execution creditor (whose writ of *fi. fa.* was in S.'s hands at the time of seizure), to recover a judgment against him S. (which he had to pay) for not paying over the amount paid to defendant for rent. An exemplification of J.'s judgment was put in at the trial. *Held* that the exemplification of J.'s judgment was an estoppel upon the defendants, and that defendants were rightly prohibited at the trial from giving evidence of the time at which the rent accrued due. *Smith v. Cleghorn*, 520.

## BOUNDARY.

*Line commissioners.*]—See SURVEY.

*Notice of title—Limited to at trial.*]—A line run without legal authority between lots 5 and 6, and acquiesced in for years, was subsequently found to be erroneous, and a new line was run according to law, which took away land from the supposed lot 5 and added to 6. Plaintiff in this action sought to recover the said land so taken, which was clearly a part of lot 6, claiming right by possession, though his grantor never pretended to have any right thereto, and he did not claim by possession in his notice. *Held* that plaintiff in his notice not having set up a possessory title is debarred from doing so at the trial. *Smith v. Cluxton*, 538.

## BREACH.

See COVENANT.

*Of penalty in bond to sheriff.*]—See BOND, 3, 4.

*Of covenant to build.*]—See LEASE, 3.

*In bond.*]—See BOND, 4, 5.

## BY-LAW.

1. *Illegality—Uncertainty.*]—The court will only quash a by-law in the whole or in part for illegality, want of clearness of expression or a difficulty in construing or applying its provisions being no sufficient grounds to support an application to quash it. *In re Smith and The City of Toronto*, 225.

2. *Restriction of sale of wood by—Fine under.*]—*Held* that the Municipal Institutions Act (Con. Stats. of U. C., ch. 54) does not authorise the imposition of a tax per cord upon wood brought into town and not placed in the public wood market for sale. *Farquhar et al. v. The Corporation of the City of Toronto*, 379.

3. *Illegality of—Municipal Corporation Act—Con. Stat. U. C. ch. 54, sec. 223.*—A by-law authorising the reeve to issue a debenture, to be paid out of the taxes of the year following, thereby creating a debt, *Held* bad, the requirements of sec. 223 Municipal Corporations Act not having been complied with, though the by-law came within its provisions. *Clapp v. The Corporation of Thurlow*, 533.

### CHATTEL MORTGAGE.

*Possession—Right of mortgagor to remain in till default—How far the jus tertii can be set up in an action by the mortgagor v. the mortgagee.*—The plaintiff mortgaged his goods to A., to whom the defendant was administratrix. The goods came into the possession of defendant, but under what circumstances did not appear. The mortgage contained an agreement that on default the mortgagee might take possession, and a statement that a delivery of possession was given at the time of executing the mortgage. There was no evidence that the mortgage money had been paid. The plaintiff afterwards executed three other mortgages of the same goods to other parties, each containing a similar agreement upon default and a similar statement as to delivery of possession. *Held* that the plaintiff under these circumstances could not recover either in trover or *detinue*, and that the defendant might, as against him, set up the right of the other mortgagees. *Ruttan v. Beamish*, 90.

2. *Power of sale in default—Re-purchase by mortgagee—Trustee.*—One D. holding a chattel mortgage upon certain property with a condition therein that in default he should have power to sell upon due notice, and that the mortgagor, should he sell, should still be responsible for any balance unpaid;

upon default being made, he did sell, and re-purchased some of the goods, which he subsequently exchanged for land. Upon an action brought for the balance over the amount realized by the original sale, the defendant demurred on the ground that the plaintiff must be considered a trustee for him in the re-purchase, and having sold at an advance must account for the balance. *Held* that this court could not deal with the case, and to obtain relief an application must be made in the Court of Equity. *Annes v. Dornan*, 299.

### CLIENT.

*Costs between attorney and.*—See COSTS.

### COGNOVIT.

*Judgment on—Application to set aside—Consol. Stats. U. C. ch. 26, sec. 17.*—Plaintiffs having entered judgment on a cognovit given by defendants, issued execution and seized the goods of defendants A. W., and H. & Co. having also recovered judgments and placed executions in the sheriff's hands, make this application to set aside the execution of plaintiffs, or to place the same subsequent to their execution on the ground that the cognovit on which the judgment was founded was void as against creditors under ch. 26, Consol. Stat. U. C., sec. 17. *Held* that the court ought not to interfere, but leave the parties to enforce their respective claims against the sheriff. *Ferguson et al. v. Baird et al.*, 493.

### COLLECTOR.

*Under School Trustees.*—See SCHOOL, 5.

### COLLECTION.

*Of Taxes.*—See SCHOOL, 1, 2.

## COMMON COUNTS.

*See* GUARANTY, 2.

*Recovery of Money on.*—*See* PAYMENT.

*Purchase of land*—*Verbal agreement for.*—Declaration that defendant by verbal agreement contracted to sell a lot of land to plaintiff for £2500, and received on account of purchase money £50. The contract was afterwards mutually abandoned, defendant agreeing with plaintiff, in consideration of such abandonment, that he would repay the £50, provided that he (the defendant) sold the land for more than £2500; that defendant did sell, &c., yet refused to pay, &c., and on common counts to which the defendant pleaded he did not promise. On motion for new trial, *Held* that plaintiff cannot recover on the common counts, the abandonment having arisen from his own inability to fulfil the agreement, and that on such ground there was no implied promise of defendant to pay, and that the absence of a written agreement for the purchase of land did not entitle plaintiff to recover back his purchase money. *Campbell v. Grier*, 295.

## COMMITTEE.

*See* BANK.

## COMPANY.

*Road*—*Their liability for deviation in construction of.*—*See* ROAD.

## CONDITION.

*Precedent.*—*See* CONTRACT, 1.—COVENANT, 2.

*On policy of insurance.*—*See* INSURANCE.

## CONSIDERATION.

*See* WILL.

*In lease.*—*See* LEASE, 2.

*In assignment for the benefit of creditors.*—*See* ASSIGNMENT, 1.

## CONSTRUCTION.

*Of railway.*—*See* RAILWAY.

## CONTRACT.

*See* INTEREST.

*By a testator.*—*See* EXECUTORS.

*By married woman.*—*See* MARRIED WOMAN, 1.

1. *Condition precedent*—*Special count.*—Upon a contract extending over several years for work and labour to be paid for by instalments, the defendants admitted part performance of the contract upon which the action was brought, and pleaded general non-performance to the satisfaction of their officer named in the contract, and that thorough and complete performance was a condition precedent to payment. *Held* that by payment in part they were not barred from claiming full performance, and to the satisfaction, &c., as a condition precedent, the contract being in consideration of performance, and not in consideration of his covenant to perform. *Coatsworth v. The City of Toronto*, 73.

2. *For sale of land*—*Acceptance of*—*Mailing answer.*—Upon an action brought for breach of an agreement in not conveying land, the following letter was proved in evidence—"I have concluded to let you have the south half of the north half of lot No. 2, in the 1st concession of Scarborough, say 50 acres, more or less, for \$3000—one thousand down, one thousand on the 1st of June

next (1860), and one thousand on the 1st day of June (1861), the same bearing interest at six per cent," &c. Signed by defendant, and that an answer was mailed, which it appeared had not come to hand. *Held* that the above letter contained evidence to shew that an offer had been made, to which it was a reply and an agreement to sell, and was sufficient with the proof of the mailing of a reply (as to when plaintiff would be up, &c.) to sustain an action for damages arising from the breach of the contract; and as to damages, the defender having wilfully broken his agreement (which was accepted within a reasonable time by posting an answer) by selling to a third party at an increased price, *held*, to make the case an exception to the generally established principle (of fraud being necessary to recover damages), and that the verdict of the plaintiff was correct. *Hagarty*, J. dissenting. *Pierce v. Small*, 161.

3. *Order by one contractor—Payment for both.*—The plaintiffs entered into a joint contract for the performance of certain work for the defendants, to be paid monthly as the work progressed; the defendants through their treasurer opened accounts and paid moneys on orders, making the cheques payable to North & Turnbull, which cheques were endorsed sometimes by North and sometimes by Turnbull, in the name of N. & T. Upon an action brought for a balance of \$496 81c., the defendants pleaded a tender before action and payment into court of \$256 81c., and an order and payment thereunder in the following words: "Brantford, 31st July 1858. Allan Cleghorn, Esq., Reserve \$300 from the Central School, payable to Ritchie & Russell. North & Turnbull." This was signed by Turn-

bull. *Held* that the payment thereunder was a payment on account of the plaintiffs, and could not be recovered again. *North & Turnbull v. The Brantford School Trustees*, 401.

4. *Acceptance by engineer of work under—Principal bound by.*—Plaintiffs having contracted with defendants to perform certain works to be paid for monthly in debentures made by defendants, on the estimate of their engineer, payments to be made by orders on the debentures or proceeds thereof to be deposited in the hands of B. F. & Co., London, England. The third breach of the declaration being that though plaintiffs completed their work, and the defendants delivered to the plaintiffs orders to the amount of the certificates of the engineer, &c., from B. F. & Co., in whose hands defendants alleged the debentures had been deposited, yet the defendant did not deliver, &c., but B. & Co. being their agents wrongfully refused for an unreasonable time to deliver the debentures or proceeds, &c. *Held*, 1st. That the plaintiffs were not obliged to notify the defendants of the completion of the work and acceptance thereof by the engineer of defendants, he being their own servant whom they had authorised to accept the work, and by whose act they were therefore bound. 2nd. That on completion of the work and acceptance by the engineer of defendants, the payment therefor became immediately due on request and no demand was necessary. 3rd. That B. F. & Co. were the agents of both plaintiffs and defendants, and that neither party were liable to the other for their (B. F. & Co.'s) acts as being *tortious*. *Wilson et al. v. The Corporation of the United Counties of Huron and Bruce*, 498.

## CONVEYANCE.

*See* EJECTMENT, 3.

*Registry of after a judgment—How far good.*—*Held*, upon the authority of *Thirkell v. Paterson*, 18 U. C. Q. B., 75, that a conveyance made by a debtor for a valuable consideration after the recovery and registry of a judgment against him, was entitled to prevail at law in preference to the judgment, the court abiding by the decision of a tribunal of co-ordinate jurisdiction till that decision is overruled in appeal. *Wales v. Bullock*, 155.

## CORPORATION.

*Execution of deed by individuals composing.*—COVENANT, 2.

## COSTS.

*See* AGENT. EJECTMENT, 2.

*Of reference.*—*See* ARBITRATION.

*Of Pleading.*—*See* SCHOOL, 4.

*Attorney and Client—The amount of the verdict governs them.*—*Held* that a party who gave instructions to commence an action without specifying the court (the attorney not stating that he would expect him to pay the difference should the verdict be within the county court jurisdiction, and commencing the action in the superior court) was only liable for county court costs between attorney and client, the sum recovered being within the jurisdiction of the county court, and no higher costs being taxable between party and party. *Scanlon v. McDonough*, 104.

## COUNCIL.

*Duty of to provide offices for registry purposes.*—*See* MANDAMUS.

## COUNTY COURT.

*See* BILL OF SALE.

## COVENANT.

*To build.*—*See* LEASE, 3.

1. *Breach—Eviction—Damages.*—An allegation in a declaration that the defendant (who sold and conveyed a certain lot to plaintiff) covenanted that at the time of the ensealing and delivery of the deed he was and stood rightfully seised in the fee simple of the land, and had good right to convey and dispose thereof, setting out a breach without averring an eviction, *Held* insufficient to entitle plaintiff to substantial damages. *Graham v. Baker*, 426.

2. *Execution of by individuals—Intended as corporate—Condition precedent.*—Where four parties, described not by their own names and personal descriptions, but as a collective body not shewn to be corporate, signed and sealed a deed with their own names and seals, they were *held* to be individually bound. Upon a covenant to pay, in consideration of certain work to be performed, the first payment to be made before the time fixed for the completion of the contract, *Held* that the performance of the work was not a condition precedent to payment. *Cullen v. Nickerson*, 549.

## CREDITOR.

*Assignment for benefit of.*—*See* ASSIGNMENT, 1, 3.

*Assignment to defraud.*—*See* MISDEMEANOUR.

*His rights without becoming a partner.*—*See* PARTNERSHIP.

CROWN.

*See* ALIEN.

DAMAGES.

*See* AGENT.—BOND, 3.—COVENANT, 1.—TROVER, 1.

*Reservation of for Court.*—*See* ISSUES.

*Material or nominal.*—*See* ISSUES.

*Right of reversioner to maintain.*—*See* REVERSIONER.

DATE.

*Relation of bill of sale back to, by registry.*—*See* BILL OF SALE, 1, 2.

DEED.

*Bond for.*—*See* MISDEMEANOUR.

DEMURRER.

*See* VENUE.

DESCRIPTION.

*In patent.*—*See* EJECTMENT, 5.

DEVIATION.

*In line of road.*—*See* ROAD.

DISTRESS.

*For taxes.*—*See* TAXES, 1, 2.

*For rent.*—*See* RENT.

*Distress—By agent in his own name—Ratification of by principal.*—A distress made by an agent for the benefit of his principal, in his own name instead of his principal's, and subsequently ratified by the principal, *held* legal. *Grant v. McMillan*, 536.

DISTURBANCE.

*Of right of ferry.*—*See* FERRY.

DIVISION COURT.

*Clerk—His liability to bailiff for fees.*—*See* SURETY.

*Bailiff—Surety of—How far relieved by his not executing.*—*See* SURETY.

*Appeal from.*—*See* TROVER, 2.

*Clerk—Securities by—Allowance of—Filing.*—*Held* that it is the duty of the county judge to fix the amount and number of sureties to be given by the division court clerk, before his entering on his duty as such clerk. 2nd. That a count admitting the proper direction as to the number and amount of sureties, but not alleging any loss or injury resulting from the non-filing or otherwise of such securities, or shewing any damage to have arisen to the plaintiff thereby, *held* bad on demurrer. 3rd. That a count admitting the fulfilment of the requirement of the statute, but denying that the sureties were freeholders or residents of the county, *held* bad on demurrer. 4th. That the county court judge is not responsible for the filing of the securities of the division court clerk. 5th. That the non-filing of the security as required by the statute would not relieve the sureties of a division court clerk from their responsibility as such sureties, but that the other provisions being complied with, they are liable whether the security is filed or not. *Parks v. Davis*, 229.

DOWER.

*Estoppel.*—*Held* that the recitals in a deed poll are not binding on the grantee, they being entirely the language of the grantor, consequently that the grantee is not

estopped from setting up the contrary "in an action not founded on the instrument and wholly collateral to it."—*Lydia Minaker v. Samuel Ash*, 363.

## EJECTMENT.

See BOND, 1.

1. *Notice of title and defence*—*How far proof necessary when title not denied.*—*Held* that the omission of the words "besides denying the title of the plaintiff" in the defendant's notice of defence did not entitle the plaintiff to recover without proving the title stated in his notice. *Held* also that the appearing of the defendant at the trial, he having filed an appearance without any notice of defence, would equally put the plaintiff on proof of his title; but having proved his title the defendant would be debarred from giving rebuttal evidence. *Shore et al. v. McCabe et al.*, 26.

2. *Mesne Profits—Costs.*—The plaintiffs having recovered in an action of ejectment against one Withrow the possession of certain lands occupied by Withrow as tenant to defendant, they bring an action against defendant for mesne profits, and succeed; the costs of the ejectment suit being allowed as part of the damages on the action for mesne profits. These costs were subsequently reduced on revision by the master in Toronto by the sum of £120, 15s. 2d., and this motion was made to reduce the verdict by that amount. *Held* that the amount taxed on the revision in Toronto was the amount plaintiffs were entitled to, and the verdict was reduced accordingly. *Neale et ux. v. Winter*, 199.

3. *Executors—Power—Conveyance.*—A testator, "J. C.," by will "authorised and empowered" his exe-

cutors, or a majority of them (naming five), to sell and convey certain lands, the lot in dispute among others, and to apply the proceeds to a specific purpose, and left all the rest and residue of his estate to his wife E. C., to be disposed of by her as she should see fit. E. C. subsequently sold to one J. W. the land in question for a valuable consideration, which consideration was applied according to the terms of the will. The plaintiffs claimed title through the will of J. W. The other four executors of J. C. refused to act, except on one occasion, when it was proved that being sued they joined in a deed of conveyance (not of the lot in dispute in this action); it was further proved that John T. Carscallen, one of the defendants, had recovered a judgment in ejectment against Nicholas and Owen Wessels, two of the plaintiffs. The defendant J. T. C. claimed title as heir-at-law of Archibald Carscallen, who was heir-at-law of J. Carscallen, and insisted that the conveyance of Esther C. being void for want of power to convey he was entitled to succeed as heir-at-law of John C. *Held* that Esther Carscallen having a power coupled with an interest, the conveyance was good, and the plaintiffs were entitled to prevail. *Nicholas Wessels, Owen Wessels, John Wessels, and Esrom Wessels v. John T. Carscallen and Stephen Crandell*, 215.

4. *Mortgage—Judgment in covenant thereon*—*How far it acts as an estoppel in Ejectment.*—*Held* that the recovery of a judgment in an action of covenant upon a mortgage on pleas of "non est factum," and that he was not indebted as alleged and payment before action, did not estop the defendant from impeaching the same mortgage in an action of

ejectment subsequently brought thereon on the ground of usury. *The Edinburgh Life Assurance Company v. Clark*, 351.

5. *Patent — Description in.*— Upon ejectment brought to recover possession of certain lands, called part of 22 of the 5th concession of Hamilton, and described as extending to the edge of Rice Lake, it was proved that there was a concession in the original survey of the township (called the 9th), between the 8th (to the north thereof) and Rice Lake. The plaintiff proved that the patent under which he traced title described the 8th concession as extending to the bank of Rice Lake, but the deed to himself only stated the lot without giving metes and bounds. *Held* that although the specific description in the patent and not the general description of the lot would probably govern, yet the plaintiff having in his notice of title only claimed lot 22 in the 8th concession, whereas the part contended for was in the 9th concession, the defendant was entitled to a verdict. *Henderson v. Harris*, 374.

6. *Agency—Estoppel.*— In an action of ejectment by the executors of R. B. against defendant as lessee of R. B. deceased, receipts given by the attorneys of R. B. were proved, mentioning money paid as "due the Smeathman" estate. *Held* that the doctrine of a tenant being debarred from denying the title of his landlord did not apply, the defendants appearing by the evidence to hold under the Smeathman estate, and not under the plaintiffs. *Baldwin v. Burd et al.*, 511.

## EMBEZZLEMENT.

*See SLANDER.*

## ENDORSEE.

*Of promissory note.*—*See* PROMISSORY NOTE, 2.

## ENDORSEMENT.

*Of bill of exchange.*—*See* BILL OF EXCHANGE, 2.

*Of guaranty on lease.*—*See* LEASE, 2.

## ENGINEER.

*Acceptance of work by.*—*See* CONTRACT, 4.

## EQUITABLE PLEA.

*See* GUARANTY.

## ESTOPPEL.

*See* DOWER. BOND, 5. EJECTMENT, 6.

*In ejectment on mortgage by judgment in covenant.*—*See* EJECTMENT, 4.

## EVIDENCE.

*See* BOND, 5. PROMISSORY NOTE, 2.

*Verdict against weight of.*—*See* RAILWAY, 1.

*How far an informal lease may be looked at.*—*See* SHERIFF.

## EVICTIION.

*See* COVENANT, 1.

## EXECUTORS.

*See* EJECTMENT, 3.

*Contract by testator—How far binding on.*— Upon an action brought against the executors of a testator for the board and educa-

tion of his (the testator's) daughter, a verbal contract at the most for three years was proved with the the testator, and knowledge of his death being shown by the plaintiffs themselves, by charges made in their account, *Held* that the contract not being a binding one upon the testator if alive, this action cannot be maintained thereon against the executors after his death. *Institute of Ladies of the Sacred Heart v. Matthews et al., Executors of John B. Crouse*, 437.

### EXECUTION.

*Against a deceased debtor.*—See MORTGAGE.

### FALSE RETURN.

*To fi. fa.*—Action for against sheriff—Surety—Competency of as a witness.]—*Held* that the endorser of a promissory note, a judgment upon which had been recovered against the maker, and which he (the endorser) has not paid, is a competent witness in an action brought against a sheriff for a false return to a *fi. fa.* issued on the judgment. *Johnstone v. Smith, Sheriff*, 220.

### FENCE.

*Duty of Railway Company to.*—See RAILWAY, 2.

### FERRY.

*Right of—Disturbance of—Omission of possessor to furnish sufficient accommodation.*—Upon an action for the infringement of the right of a ferry, *Held* that the omission to furnish full accommodation to any number of persons offering themselves to be ferried over is no defence to an action for a disturbance of an admitted right. *Hickley v. Gildersleeve*, 460.

### FIERI FACIAS.

*See* FALSE RETURN.

### FILING.

*Of securities of division court clerk.*—See DIVISION COURT.

### FORFEITURE.

*Of estates by alien.*—See ALIEN.

### FINE.

*Under by-law restricting the sale of wood.*—See BY-LAW, 2.

### FIXTURES.

*Not distrainable for taxes.*—See TAXES, 1.

### FOREIGN.

*Judgment.*—See JUDGMENT.

### GRANTEE.

*Memorial signed by—How far evidence.*—See MEMORIAL.

### GUARANTY.

*See* SCHOOL, 5.

*Indorsement of on lease.*—See LEASE.

1. *Surety—Equitable plea—Time given to principal.*—Action by H. against M. on a guaranty of a mortgage made by one G. and assigned by M. to H. *Plea* (on equitable grounds) that the mortgage was given by Grey as collateral security for two promissory notes of £100 each, made by Grey to one W., and endorsed by him, and that said notes were given to H. (plaintiff) with the mortgage, and that one note having become due, H., without notice of presentment and dishonour, and without defendant's

consent, gave Grey time for a valuable consideration; on demurrer *held* good, and that the defendant as surety was thereby discharged. *Howee v. Mills*, 194.

2. *Common counts.*—H. signed a writing in the following words:—"Toronto, 16th December 1858. Mr Dixon—Please let the bearer, Thomas Billings, what goods he may require, and charge yours, M. Hutchinson." *Held*, 1st. Not to amount to a guaranty for goods furnished Billings on the authority of it. *Draper, C.J.*, and *Richards, J.*, disagreeing as to the defendant's liability on the common counts, and *Hagarty, J.*, delivering no judgment, no decision was given thereon. *Grasett et al. (Executors) v. Hutchinson*, 265.

3. *Joint liability under.*—One T. A. McLean contracted with two firms in Quebec, H. J. N. & Co., and M. S. & Co., for advances to be covered by shipments of timber within a specified period, agreeing to furnish defendant's guaranty for performance of his part of contract. Defendant in a letter to M. S., a partner in one of the firms, guarantees that T. A. M. will furnish timber in the year 1859 equal in value to the amount of advances made by him M. S. to said T. A. M. *Held* that joint action of M. S. and H. J. & Co. will not lie. 2nd. That in an action by M. S. alone he can only recover the amount of *his own* advances to T. A. M. 3rd. That M. S. must, as far as defendant is concerned, give credit for all lumber received by him from T. A. M. *Stevenson et al. v. McLean*, 414.

HEIR.

*At law*—*Registry of deed by, prior to will.*—See WILL.

ILLEGALITY.

*In by-law.*—See BY-LAW, 1, 3.

INFRINGEMENTMENT.

*Of right to ferry.*—See FERRY.

INSOLVENT.

See BANKRUPT.

INSURANCE.

*Policy—Conditions—Pleading.*]  
Declaration (alleging a total loss) on a policy for \$5000 on the hull, tackel, apparel, and other furniture of the steamer "Boston," which stated the value to be \$15,000. That in case of loss prompt notice of the disaster and plan adopted for the recovery and saving, &c., should be given; to sue, labour, and travel &c., &c., without prejudice to the insurance, and after survey, as therein provided, insured were to cause the same to be prepared; and in case of refusal, insurers were authorised to interpose and cause the same to be repaired, &c. All acts done or committed to be for the benefit of all concerned, and not to prejudice parties: that the insured should have no right to abandon unless under particular circumstances, and under no circumstances except by written notice delivered to the authorised agents of the insurers, nor unless such notice should be sufficient to vest in the company an unincumbered and perfect title to the subject abandoned: by an endorsement on the policy the vessel was insured *against total loss only*. Averment that plaintiff duly abandoned to said defendants, who thereupon accepted the said abandonment. 2nd plea—that the vessel became stranded while proceeding upon her voyage, and plaintiff

ought to have used prompt and efficient means for her safeguard and recovery, and repaired her when recovered; but plaintiff neglected and refused, and thereupon defendants interposed according to the terms of the policy, recovered and repaired the vessel, and put her in as good repair as before she was stranded, and offered to restore her on payment by plaintiff of his fair proportion, but he refused; and that defendants caused a proper survey to be made before repairing. Upon demurrer, *held* to be no answer, because this plea does not shew there was no constructive total loss, and the right so to act must, under the terms of the policy, be taken to be for the benefit of all concerned, and without prejudice to the rights of either party. 3rd plea—That plaintiff did not duly abandon nor did defendants accept abandonment as alleged. 4th plea—That the abandonment as alleged was not sufficient to convey to and vest in defendants an unincumbered title to the vessel. Both pleas *held* good on demurrer, because if not traversed they would lessen the proof to be given for a constructive total loss (with a view to which the declaration seemed framed). 5th plea—That if the note given for the premium should not be paid at maturity, the full amount of premium should be considered earned, and the policy should become void while said note remained over-due, and that plaintiff did give his note, which remained over-due at the time of the commencement of suit, upon demurrer. *Held* that there being a provision in the policy that the premium note in cases of loss should be deducted before payment of the amount insured, and the premium note not being shewn to be due when the loss occurred, the plea was bad. *Meagher v. The Home Insurance Company*, 313.

## INTERPLEADER.

See *TROVER*, 2.

*Purchase by plaintiff under prior execution—Proof of judgment under which issued.*—Interpleader issue to try right to goods in possession of and bought by plaintiff at sheriff's sale under *fi. fa.* against execution debtors, as against defendant, the execution creditor. *Held* that plaintiff was not bound to prove a judgment to support the prior execution under which she bought the goods. *Hammill v. De Wolf*, 419.

## INTEREST.

*Money paid as such over six per cent.—How far recoverable.*—*Held* that money paid in excess of six per cent. interest upon a contract not void by act of parliament, for the payment of such interest cannot be recovered back. *Jarvis v. Clark et al.*, 480.

## ISSUES.

*In fact—Reservation of damages for the court—Question of material or nominal damages.*—Where issues in fact were left to a jury, reserving the question of nominal or substantial damages for the opinion of the court, *Held* that the only question for the court was, whether the plaintiff should be limited to nominal damages, or recover the actual value of his goods. The question of mitigating the damages upon the facts proved could not be considered.—*Robson v. The Buffalo and Lake Huron Railroad Company*, 279.

## JOINDER.

*Of husband in action against a married woman.*—See *MARRIED WOMAN*.

JOINT (LIABILITY.)

*Under Guaranty.*—See GUARANTY, 3.

JUDGMENT.

*Registry of.*—See CONVEYANCE.

*In covenant on mortgage.*—See EJECTMENT, 4.

*Proof of under an interpleader issue.*—See INTERPLEADER.

*Exemplification of.*—See BOND, 5.

*On Cognovit.*—See COGNOVIT.

*Allegation of—Pleadings.*—A declaration on a foreign judgment, alleging the recovery of £20, 13s. 8d. debt, and £38, 1s. 2d. costs, amounting in all to £58, 17s. sterling, or \$286, 41c. lawful money of Canada; that the court was a superior court of record, and that the judgment was in full force and unpaid—*Held* to disclose a sufficient ground of action, and not to be open to the objection taken in *Place v. Potts*, 8 Exc. 704. *Kelly v. McDermot*, 490.

JUS TERTII.

*How far it can be set up.*—See CHATTEL MORTGAGE, 1.

LAND.

*Possession of.*—See BOND, 1.

*Contract for sale of.*—See CONTRACT, 2.

*Payment in purchase of.*—See PAYMENT.

LANDLORD.

*Tenant—Lease.*—The defendant in an action of ejectment claimed title as tenant of the party through whom plaintiff claimed, by virtue

of letters under the terms of which he (the defendant) was entitled to possession for ten years upon certain conditions which he had performed. *Held* that he thereby obtained a yearly tenancy, and was entitled to six months' notice to quit. *White v. Nelson*, 158,

LEASE.

See LANDLORD—REVERSIONER.

*Rent—Payment of in advance.*—Under a lease dated 1st October 1857, *habendum* for five years from the date thereof, "yielding and paying therefor on every first day of October during the said term," it was proved that the first year's rent had been paid in advance. *Held* that the rent was not payable in advance under the terms of the lease, and that the term included the whole of the 1st October 1862. *McCallum v. Snyder et al.*, 191.

2. *Endorsement of guaranty thereon—Not under Seal—Consideration.*—A. by indenture leased from B. certain premises, covenanting to pay certain rents. On the back of the lease was the following memorandum signed by C.—"I do guarantee that the within rents shall be paid by me as they become due according to the lease, in case or in event that the within named A. does not pay them." This endorsement was made and signed before the delivery of the lease, and as a part of the same transaction. *Held* that the lease and the endorsement might be looked at together for the purpose of making out a consideration for the defendant's promise, and that the letting of the premises formed a sufficient consideration. *Merrick v. L'Esperance*, 250.

3. *Covenant to build—Breach of—Waiver of breach.*—An indenture

of lease was entered into between plaintiff and defendant, *habendum* for 21 years; with a covenant by the lessee (defendant) to erect within four years a house, &c., which covenant was broken before the commencement of this suit. The lessor received rent to a period subsequent to the time of the alleged forfeiture. *Held* to be a waiver of the right of entry for breach of the covenant to build. *Roe v. Southard*, 388.

4. *Agreement to furnish steam power*—*How far a void lease may be referred to, to ascertain the terms of letting.*—Plaintiff leased to one M. for a term of ten years certain premises in writing not under seal, under certain terms, M. to furnish plaintiff with steam power to the extent of five horses. Defendant for some time carried on the business in partnership with M., and subsequently, a dissolution having taken place, continued the business himself. During the partnership a certain amount of steam power was provided for plaintiff by lessee. Plaintiff brings this action against defendant for not furnishing the *quantum* of steam power since the dissolution. Defendant denied his liability, setting up a yearly tenancy not under seal, and that he was not a tenant under the agreement entered into with M. *Held* 1. That the agreement or lease to M. was void, not being under seal, but may be referred to for the terms of the letting. 2. That his promise to furnish power, &c., is an implication of law arising out of the facts and situation of the parties. *Lyman et al. v. Snarr*, 462.

#### LIMITATION.

*Of time for distress for taxes.*—*See TAXES.*

*In ejectment to notice.*]—*See BOUNDARY.*

#### LOCOMOTIVE.

*Running of.*]—*See RAILWAY*, 2.

#### MAILING.

*Answer in acceptance of contract.*]—*See CONTRACT*, 2.

#### MANDAMUS.

*Con. Stat. U. C. ch. 89, sec. 3*—*Division of county for registry purposes under—Duty of council to provide offices, &c.*]—The county of Northumberland having been on the 1st of December 1859 divided into ridings, east and west, for registry purposes, and the county council having for eighteen months neglected to provide offices, vaults, &c., for the safe keeping of the books, &c. On return to a writ of *mandamus*, *Held* that ch. 89, sec. 3, of *Con. Stats. of U. C.* is declaratory of the 19th sec. of 9 *Geo. IV.*, ch. 34, and governs cases before the passing thereof (December 5, 1859), and that the defendants are under said act obliged to furnish offices, vaults, &c. *The Queen v. The Corporation of the United Counties of Northumberland and Durham*, 526.

#### MARRIED WOMAN.

1. *Contract by*—*Consol. Stat. U. C. ch. 72.*]—G. having recovered a judgment in a division court against one D. on a note made by her after her marriage to K. (the present plaintiff), under execution founded thereon, he seizes goods, &c., which were the separate property of D. (wife of K.), under *Consol. Stat. U. C.*, ch. 73, for the detention of which goods this action was

brought. *Held* that the statute does not enable a married woman to bind herself as a *femme covert* to a greater extent than she was able to do before the passing thereof. 2nd. That an action on a contract made by a married woman before marriage will not lie against her *without* her husband being joined with her therein as a party, *he being a resident within the province*. 3rd. That an action will lie against a party seizing separate goods of his wife out of possession of her husband. *Kraemer v. Gless*, 470.

2. *Action against—Joinder of husband—Pleading.*]—Upon an action brought against a married woman for a cause of action which accrued *dum sola*, *Held* 1. That the husband was properly made a party thereto. 2nd. That it is necessary to aver that at the time the action was commenced the female had separate estate. *Muldoon v. Bilton et al.*, 382.

### MEMORIAL.

*Signed by grantee—Not alone proof of original instrument—Possession.*]—*Held* that proof by a witness that he saw a deed apparently answering the description contained in the memorial, and its loss; without further proof of handwriting or genuineness, a memorial in the county registry executed by the grantee only, and proved by an affidavit endorsed of a witness who swore that he saw the conveyance duly signed by the grantor, is, in the absence of any act done or possession taken for a long series of years, not good secondary evidence of the original conveyance. *Gough v. McBride*, 166.

### MERGER.

*Of promissory notes by taking*

*mortgage as collateral.*]—*See PROMISSORY NOTE*, 3.

### MESNE PROFITS.

*See EJECTMENT*, 2.

### MISDEMEANOUR.

*Bond for deed—Seiure of—Assignment of to defraud creditors.*]—Upon an indictment under 22 Vic. ch. 96, for making an assignment to defraud creditors, *Held* that a money bond is personalty seizable on an execution under the statutes 13 & 14 Vic. ch. 53, and 20 Vic. ch. 57; and further, that a transfer made by a party to a creditor, who accepted the same in full satisfaction and discharge of his debt, did not render the party making such assignment less liable under this indictment. *Richards, J.*, dissenting. *The Queen v. Potter*, 39.

### MISNOMER.

*See BOND*, 4.

### MORTGAGE.

*See EJECTMENT*, 4—*REVERSIONER*.

*As collateral security to promissory notes.*]—*See PROMISSORY NOTE*, 3.

*Seizure of under an execution against the mortgagee—Execution against a deceased debtor—Waiver—Pleading.*]—Upon an action brought by a sheriff upon a mortgage seized by him under an execution in a suit, *Smith v. Lawrence*, the mortgage being made by B. (the defendant) to Lawrence, *Held* that a judgment creditor may take the goods of a deceased debtor in the hands of the executor upon a *fi. fa.* against goods if the judgment was recovered within a year before the debtor's death, and that

a plea admitting the death of a testator subsequent to the issuing of a *ven. ex.* and *fi. fa.* and while it was in force, but claiming that by the death the property seized became vested in the personal representatives of the deceased, and was not therefore liable to seizure, was bad. *Held* also that a plea upon equitable grounds, admitting the making of a mortgage for a certain amount between the defendant and the judgment debtor, but claiming that an agreement that certain sums (when paid as therein mentioned) were to have been allowed on the first instalment (for which this action was brought) did not amount to a variance of a covenant by a parol agreement, and was therefore good. *Smith (sheriff) v. Bernie*, 243.

### MORTGAGOR.

*In chattel mortgage—His right to remain in possession till default.*—See CHATTEL MORTGAGE, 1.

*Right to set up the jus tertii in an action by.*—See CHATTEL MORTGAGE, 1.

### MUNICIPAL.

*Corporations Act.*—See BY-LAW, 3.

### NOTICE.

*Of title and defence.*—See EJECTMENT—BOUNDARY.

### OMISSION.

*To furnish sufficient accommodation on a ferry.*—See FERRY.

### ORDER.

*By one of two joint contractors.*—See CONTRACT, 3.

### PAROL.

*Agreement for payment of rent.*—See SHERIFF.

### PARTNER.

*What right a creditor has without becoming one.*—See PARTNERSHIP.

### PARTNERSHIP.

*Participation in profits—What rights a creditor may have without becoming a partner.*—*Held* that a party agreeing to give a firm who were indebted to him five years for the payment of the debt, with the understanding that he was to be paid out of the profits, with the right when the debt due him equalled the interest of the members of the firm, to become a co-partner therein if he chose, or receive a bonus from the business, did not constitute him a member of the partnership or make him liable for its debts. Such an agreement does not constitute “a participation in profits.” *Hill et al. v. Bellhouse et al. Darling v. Bellhouse et al.*, 122.

### PATENT.

See ABSTRACT—EJECTMENT, 5.

2. *Stat. 12 Vic. ch. 24—Patent.*—Upon an action brought for the infringement of a patent right, *Held* that the *stat. 12 Vic. ch. 24, sec. 16*, only requires the date of the patent to be stamped on articles sold or offered for sale, and does not make such stamping *per se* amount to a license to use the invention. *Smith et al v. Mitchmore*, 391.

### PAYMENT.

*Under joint contract.*—See CONTRACT, 3.

*Of rent in advance.*—See LEASE.  
*In purchase of land—Appropri-*

*tion of money—Recovery of on common counts.*]—A party purchasing land through the persuasion of another (who did not pretend to have a title himself), with notice of an incumbrance thereon, and making no search at the registry office, and paying the consideration to the person through whose persuasion he purchased, who appropriated it with his knowledge and consent towards the payment of the incumbrance as far as it went, *Held* that it was not recoverable upon the common counts from the party to whom he paid it. *Miller v. Cummings*, 448.

### PLAN.

*Of work done by surveyor.*]—See SURVEY.

### PLEADING.

See BOND, 2, 4. — INSURANCE — MORTGAGE—PROMISSORY NOTE—RAILWAY, 2--MARRIED WOMAN, 2.  
*A prescriptive right.*]—See USER.  
*A foreign judgment.*]—See JUDGMENT.

### POLICY.

*Of Insurance.*]—See INSURANCE.  
*Agent—In whose name action must be brought.*]—*Held* that an action upon a policy of insurance must be brought in the name of the party in whose behalf the policy issued, and with whom the covenants are made. *Every v. The Provincial Insurance Company*, 20.

### POSSESSION.

See CHATTEL MORTGAGE, 1.—MEMORIAL.

*Change of.*]—See BILL OF SALE, 2.  
*Of land.*]—See BOND, 1.

### POWER OF SALE.

See EJECTMENT, 3.

*On default in chattel mortgage.*]—See CHATTEL MORTGAGE.

### PRESCRIPTIVE.

*Right.*]—See USER.

### PRINCIPAL.

*Release of surety by giving time to.*]—See GUARANTY, 1.

*How far bound by acceptance of work by engineer under a contract.*]—See CONTRACT, 4.

*Ratification of a distress by.*]—See DISTRESS.

### PROFITS.

*Participation in.*]—See PARTNERSHIP.

### PROMISSORY NOTE.

1. *Pleading—Set-off.*]—In an action on a promissory note by the holder (endorsee) against the maker and endorsers, a plea that the note was made and endorsed to third parties, who sent it to plaintiffs for collection, and that such third parties (who are indebted to defendants in a greater amount than the note) are the real owners of the note, *Held* bad, on the authority of *Ould v. Harrison*, 10 Ex. 572. *Metropolitan Bank v. Snure et al.*, 24.

2. *Endorsee—Evidence.*]—In an action on a promissory note made by defendants U. and B., and endorsed by C., the endorser C. having been offered as witness for defendant U., and rejected at the trial, *Held* that the endorser is not a competent witness for the maker, in deference to the decision of the Court of Queen's Bench in *Moffatt v. Robertson*. *Bank of Upper Canada v. Upton, Brown, and Cotton*, 455.

3. *Mortgage as collateral security thereto—Merger.*]—H. & Co. holding several promissory notes of F., all being overdue except one, take a mortgage as security for the total amount thereof. *Held* that on the mortgage being given and received, the remedy on the notes was extinguished by the merger of the lesser security in the higher. *Fraser et al. v. Armstrong*, 506.

### PROOF.

*See* TRESPASS.

*Of title in ejectment when not denied.*]—*See* EJECTMENT, 1.

*Of memorial by signature of grantee.*]—*See* MEMORIAL.

### PURCHASE.

*Payment in, of land.*]—*See* PAYMENT.

*By mortgagee on sale under chattel mortgage.*]—*See* CHATTEL MORTGAGE, 2.

*Of land.*]—*See* COMMON COUNTS.

*Under execution, how far proof necessary in an interpleader issue.*]—*See* INTERPLEADER.

### RAILWAY.

*Company—Bill of exchange by.*]—*See* BILL OF EXCHANGE.

1. *Unskilful construction of—Setting aside the verdict as against the weight of evidence.*]—Upon an action against a railway company for negligence in the construction of their line, it was proved on the trial that the embankment which had given way and caused the death of the party on whose account the action was brought was so constructed that a pool of considerable extent was formed, in which the drainage of 60 or 70 acres of land

would remain and saturate the railway tract upon occasions of heavy or continued rains; the jury—although several of the most eminent engineers of the province gave their opinion that the embankment was properly and skilfully constructed, and the learned judge who tried the case cautioned them against valuing such evidence lightly—gave a verdict for the plaintiff. The court upon motion for a new trial on the ground of the verdict being against the weight of evidence, discharged the rule. *Draper, C. J.*, dissenting. *Braid v. The Great Western Railway Company*, 137.

2. *Running of locomotives—Destruction of fillies by—Pleading.*]—The plaintiff stated specially a cause of action to have accrued before the passing of the stat. 20 Vic. ch. 12, and alleged a duty in the defendant to erect and maintain sufficient fences on the line of the route of their railway, and charged a breach of that duty in neglecting to erect and maintain such fences; by means whereof certain fillies or colts of plaintiff, one of which was lawfully in a certain close near the railway, and the other was lawfully on the highway near the railway, by and through the defendants' breach of duty got upon the railway, and by means thereof, and by and through the negligence of the defendants in running and propelling their locomotive engines, and while the said fillies or colts were so upon the railway, a locomotive of defendants ran against them, &c. *Held* that all the allegations respecting the duty of the defendants to fence, and their breach of that duty, by which plaintiff's fillies got on the railway, being struck out, the declaration in alleging negligence on the defendants' part in running and propelling their locomotives still disclosed a good cause of action.

*Chisholm v. Great Western Railway Company*, 324.

### RATIFICATION.

*Of distress by principal.*]—See DISTRESS.

### RECITALS.

*In a deed poll—How far binding on the grantee.*]—See DOWER.

### REFERENCE.

*To arbitration.*]—See REPLEVIN.

*Costs of.*]—See ARBITRATION.

*To a void lease to ascertain the terms of letting.*]—See LEASE, 4.

### REGISTRY.

*Of assignment.*]—See ASSIGNMENT.

*Of bill of sale.*]—See BILLOF SALE, 1, 2.

*Of a conveyance after a judgment.*—See CONVEYANCE.

*Of deed prior to a will.*]—See WILL.

*Division of county for.*]—See MANDAMUS.

### RELEASE.

*Clause in assignment.*]—See ASSIGNMENT, 3.

### RENT.

See LEASE, 1.

*Action against sheriff for non-payment of.*]—See SHERIFF.

*Distress for.*—Seizure of property temporarily on premises.]—Held that a pair of horses belonging to a stranger, which were driven on to premises and tied, the party in whose charge they were going into the house, were not seizable for rent if they were in actual use at the time of the distress. *Couch v. Crawford*, 491.

### REPLEVIN.

*Reference of all matters in dispute to arbitration Uncertainty in award.*]—Upon a general reference to arbitrators of all matters in dispute between two parties, *Held*, 1. That it is not necessary that the award should distinguish between the matters in dispute in the cause, upon which the reference is made, and general matters between the parties referring. 2. That by directing the delivery of a certain promissory note (which was not in dispute in this action, but was sued upon in the Queen's Bench), and upon such delivery ordering releases between the parties, and thereby, as was contended, leaving the note unsettled, the award was not rendered void. And that such direction to deliver did not constitute an excess of authority. 3. That an award (under an action of replevin for a promissory note) that declared the defendant to have detained the note illegally, and at the same time awarding that it should be delivered up upon payment of a certain sum (which amount was due thereon), was not void for inconsistency, as it affected substantial justice between the parties. *Lund v. Smith*, 443.

### RESERVATION.

*Of damages for the court.*]—See ISSUES.

### REVERSIONER.

*His right to maintain an action for damages to the reversion—Mortgage—Lease.*]—Held that an action is maintainable by the reversioner of a mill demised to a tenant, for diversion or obstruction by a stranger of water from the mill head, the obstruction being of such a character as to render the sale of the rever-

sion less valuable. The mortgagor of a property, with a clause for the retaining possession until default, (such default not having taken place), is entitled, so long as the mortgage continues in force without default, to maintain an action for an injury done to the reversion. *Rogers v. Dickson*, 481.

## REVISION.

*Of taxation.*]—See ARBITRATOR.

## ROAD.

*Construction of—Deviation from original line—Liability of company for extra expenses thereby occasioned.*]

—An agreement is entered into between the G. N. G. R. Co. and W. B. R. & Co. to construct a gravel road at a certain price and on a certain route, which route was afterwards deviated from by the G., &c., Co., and their engineers instructed the plaintiffs (who were the sub-contractors of W. B. R. & Co.) to construct the extra portion created by the deviation. Upon an action brought by the sub-contractors against the road company, *Held* that it was not maintainable, the company not having contracted with the plaintiffs, and their engineer having no authority to bind the defendants by an agreement with the plaintiffs. *Cowan et al. v. The Goderich Northern Gravel Road Company*, 87.

## SALARY.

See BANK.

## S A L E.

*On default in chattel mortgage.*]

—See CHATTEL MORTGAGE, 2.

## SCHOOL.

*Trustee—Embezzlement of money by.*]—See EMBEZZLEMENT.

*Taxes—Division of townships into school sections—Alteration of same.*]

—Under the statute 7 Vic. ch. 29, secs. 14, 24, the township council and not the *district* council have authority to sanction any alteration made in school districts. A proposed alteration being submitted by the superintendent of schools to the district council—was *held* not to legalise the alteration thereby proposed. *McFee v. Dunbar*, 94.

2. *Rates, Collection of—Trustees.*]

—A general school meeting having passed a resolution "That the expenses of the school section be paid by voluntary subscription, and the balance to be raised from a tax to be levied upon the parents and guardians of those *sending children* to the school," the school trustees, after the failure of the voluntary subscription, levied a general rate, upon which this replevin arose—the plaintiff contending that he was not liable as not being a guardian or parent of a child attending the school. *Held* that the trustees had no authority to tax the parents or guardians of those sending children, or to alter or annul the resolution, and that the 10th sub-section of the act authorised the levy as made. *Craig v. Rankin et al.*, 186.

3. *Act—Trustees—Arbitration.*]

*Held* that an award made by arbitrators appointed under the 29th section of the common school act (Con. Stats. U. C. 737) against one of the trustees (the secretary-treasurer) in his individual capacity as said trustee, for wrongfully withholding books, moneys, &c., is binding. 2nd. That the citing of a trustee to appear before the judge of the county court, under section 130 *et seq.* of school act is not necessarily a bar to proceeding by arbitration under 29th section. 3rd. That under the 130th clause the

judge of the county court has no jurisdiction, except when a secretary-treasurer "has in his possession books, moneys, &c., which came into his possession as secretary-treasurer, and which he wrongfully holds and refuses to deliver up," &c., and such secretary-treasurer must be guilty of misdemeanour, contemplated by the 130th clause, before the judge can interfere. *Thomas Ferris v. Stephen Chesterfield, Archibald Virtue, and John H. Morley*, 272.

4. *Act — Arbitration — Costs of pleading.*]—Upon trover brought for a seizure of goods upon the authority of a warrant issued by arbitrators under the school acts, held that a plea which stated that the trustees neglected or refused (without the word *wilfully*) to exercise their corporate powers for the payment of money awarded to the school teacher was bad on demurrer. Held also that the statute (Con. Stat. U. C. ch. 64) does not authorise the arbitrators to determine whether the trustees have wilfully neglected or refused to exercise their corporate powers, or to enforce against them a personal responsibility, and lastly that the school act (Con. Stats. ch. 64) does not provide for the payment of arbitrators or of the costs of a reference thereunder. *Weaver v. Bull et al.* 369.

5. *Trustees—Guaranty—Securities.*]—W. H. having been duly appointed collector by the trustees of school section, signed the following contract at the foot of the instrument appointing him:—"I agree, &c., to collect, &c., according to the said act, and bind myself, by my securities, in the sum of £250," and immediately under T. S. S. & T. F., his sureties, signed the following undertaking:—"We hereby agree to become security for the

due fulfilment of the above contract." W. H. paid over £141, 3s. 4d., a portion of the amount collected by him, the sum of £40, 5s. 9d. remaining uncollected. On an action brought by the trustees against the collector and his sureties, held that the sureties under their contract were not jointly liable with their principal for moneys uncollected by him; also that they were not jointly liable on their guaranty as sureties on default of the principal. *The Trustees of School Section No. 6, Township of York, v. William Hunter, Thomas S. Smith, and Thomas Fox*, 359.

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## SECRETARY.

*Of bank committee.*]—See BANK.

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## SECURITIES.

See SCHOOL, 5.

*Of division court clerks.*]—See DIVISION COURT.

*Collateral.*]—See PROMISSORY NOTE, 3.

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## SEDUCTION.

*Survival of action to administrator.*]—Held that a right of action for seduction does not survive to the administrator of the original plaintiff, and further that damages occasioned to the estate in the nursing and attending of the defendant did not entitle the administrator to continue the action. *Ball (Administrator) v. Goodman*, 174.

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## SEIZURE.

*Of mortgage on an execution against mortgagee.*]—See MORTGAGE.

*For distress of property temporarily on premises.*]—See RENT.

*Of bond for deed.*]—See MISDEMEANOUR.

### SET-OFF.

See PROMISSORY NOTE, 1.

### SHERIFF.

*Bond to.*]—See BOND, 3.

*Action against for false return.*]—See FALSE RETURN.

*Action against for non-payment of rent on sale of goods—Expenses of thrashing crops—Parol agreement for payment of rent—Informal lease may be looked at as evidence.*]—In an action against a sheriff for the sale of goods under a *fi. fa.*, without paying rent due to the landlord, *Held*, 1st. That the statement of the tenant in possession, made before the distress, that the first year's rent had been paid, was evidence in the cause. 2nd. That when a sheriff, acting in good faith for all concerned, agreed to pay for having grain thrashed for the purpose of its better sale, the expenses of such thrashing should be allowed him. 3rd. That a parol agreement to pay rent in advance is binding. 4th. That a lease void for the creation of a term (not being executed according to law) may be looked at to ascertain the conditions of occupation. *Galbraith v. Fortune*, 109.

### SLANDER.

*Embezzlement—How far a person having charge of money in a public capacity can be liable for.*]—*Held* that a school trustee having money in his hands, not as secretary and treasurer of a board, or in any official capacity, cannot embezzle such money, his duty as trustee not requiring or authorising him to receive it. *Ferris v. Irwin*, 116.

### SPECIAL.

*Count.*]—See CONTRACT, 1.

### STATUTE.

54 *Geo. III.*, ch. 9.]—See ALIEN.

18 *Vic. c.* 182.]—See BILL OF EXCHANGE, 1.

12 *Vic. c.* 81.]—See BOND, 2.

20 *Vic. c.* 12.]—See RAILWAY, 2.

7 *Vic. c.* 29, secs. 14 & 24.]—See SCHOOL.

*Con. Stat. U. C.* ch. 19, sec. 25.]—See SURETY.

13 & 14 *Vic. c.* 67, sec. 57.]—See TAXES, 2.

*Con. of U. C. c.* 73.]—See MARRIED WOMAN.

12 *Vic. c.* 24.]—See PATENT.

7 *Vic. c.* 10.]—See BANKRUPT.

19 & 20 *Vic. ch.* 93.]—See BANKRUPT.

*Con. of U. C. c.* 26, sec. 17.]—See COGNOVIT.

*Con. of U. C. ch.* 54, sec. 223.]—See BY-LAW, 3.

*Con. Stat. U. C. ch.* 19, sec. 25.]—See SURETY.

### STRANGER.

*Seizure of property of for rent.*]—See RENT.

### SUBORDINATE.

*Survey done by—How far valid.*]—See SURVEY.

### SURETY.

See BOND, 4—FALSE RETURN—GUARANTY, 1.

1. *Division court clerk—How far liable to bailiff for fees collected by him.*]—*Held* that the sureties of the clerk of the division court are responsible for moneys received by the clerk for bailiff's fees on actions brought in his court. And further, that entries made by such clerk in the course of his business in books

kept under the provision of an act for that purpose were evidence against the sureties in an action brought by a bailiff to recover such moneys. *Middlefield v. Gould et al.*, 9.

2. *Liability of*—*Con. Stat. U. C. ch. 19, sec. 25.*—*Held* that the surety of a division court bailiff under *Con. Stat. U. C.*, ch. 19, sec. 25, is not relieved from liability under his covenant by reason of his principal neglecting to execute the instrument containing the same. *Miller v. Tunis*, 423.

### SURVEY.

*Boundary line Commissioners—Validity of work done by subordinate.*—*Held* that a line run by a subordinate (surveyor) is the work of the latter, and must be treated as such. 2nd. That it is by the work as executed on the ground, and not as projected before execution, or represented on a plan afterwards, that the boundaries are to be determined. *Ovens v. Davidson*, 302.

### TAXATION.

*Revision of.*—*See* ARBITRATION.

### TAXES.

*See* SCHOOL.

*Right to increase without vitiating the security of collector.*—*See* BOND, 2.

1. *Distress for*—*Planing machine not fixed to freehold liable for.*—*Held* that a planing machine standing by its own weight on the floor without fastening, with belts and an engine to work it, is a chattel liable to seizure for taxes. *Hope et al. v. Cumming*, 118.

2. *Sale for*—*Distress on premises*—*Limitation of time*—*Statute 13 & 14 Vic., ch. 67, sec. 57.*—*Held* that

the period allowed for distress for taxes on premises, under 6 Geo. IV., ch. 7, is not limited to a month after the receipt of the warrant by the sheriff; and where there was proved to have been ample distress on the premises between the receipt of the warrant and the day of sale, the sale was held to be invalid. *Held* also that this case, upon the facts as stated underneath, did not come within the 57th sec. of 13 & 14 Vic., ch. 57. *Dobbie v. Tully*, 432.

### TENANT.

*See* LANDLORD.

### TERM.

*Proof of continuance of to time of trespass.*—*See* TRESPASS.

### TERMOR.

*See* TRESPASS.

### TESTATOR.

*Contract by.*—*See* EXECUTORS.

### THRASHING.

*Of crops by sheriff—Expenses of.*—*See* SHERIFF.

### TITLE.

*See* ABSTRACT.

*Notice of.*—*See* BOUNDARY.

### TOWNSHIP.

*Treasurer—Period of his appointment.*—*See* BOND, 2.

*Division of into school sections.*—*See* SCHOOL.

### TREASURER.

*Of township, his period of appointment.*—*See* BOND, 2.

### TRESPASS.

*Termor—Justification by—Proof*

of continuance of term to time of trespass.]—Upon an action for trespass in breaking and entering, and pulling down tenements, &c., the defendant justified as termor of the premises, with the right to remove buildings. *Held* that he should have proved the existence of the term down to the time of committing the grievance complained of. 2. That a surrender in fact having taken place, a release for the rent under seal is not necessary. *Wilson v. Wilson*, 476.

### TROVER.

1. *Excessive damages—Affidavits.*]—In an action of trover, damages being laid in the declaration at \$8000, and the jury having found a verdict for \$10,548, on motion for a new trial for excessive damages, *held* that though the plaintiff is limited to the amount of damages laid in the declaration, the defendant is not on that account alone entitled to a new trial, or because the damages must necessarily be deemed excessive. It is for the plaintiff to get rid of the difficulty occasioned by the verdict exceeding the amount laid in the declaration. 2nd. That affidavits sworn before an attorney who is a partner of counsel engaged in the cause, but not otherwise connected therewith, may be read. *Wilde v. Crow et al.*, 406.

2. *Interpleader—Division court decision—Appeal from.*]—Action of trover by A. K. as administratrix and J. K. against S. for goods seized by S. under a division court execution, A. K. claiming as administratrix of Thomas Weir. An interpleader issue was tried by the judge of the division court, who decided that the goods did not belong to A. K. as administratrix, &c. On motion for new trial, *Held*

that the decision of the judge of the division court is final under Con. Stat. U. C., ch. 19, 175. *Anne Keane, Administratrix of Thomas Weir and John Keane, v. Benjamin Stedman*, 435.

### TRUSTS.

*See* ASSIGNMENT, 1.

### TRUSTEE.

*See* CHATTEL MORTGAGE. SCHOOL, 2, 3.

### UNCERTAINTY.

*In award.*]—*See* REPLEVIN.

*In by-law.*]—*See* BY-LAW.

### USURY.

*See* INTEREST.

### USER.

*Prescriptive right—Plea of omitting word "next."*]—The first count of the declaration claimed the right to the flow of the stream (being possessed of a grist mill thereon) for the working of the mill. That defendant by erecting a dam diverted the water of the said stream, whereby the plaintiff was prevented, &c. There were four other counts not material to this decision. Plea 2, that defendant, as owner and occupier of the mill and land thereafter mentioned at the time of committing the grievance, &c., was possessed of land and a mill on the stream in the first count mentioned above the plaintiff's mill for upwards of twenty years before the commencement of the suit, and was entitled to and exercised during all that time the right to erect and keep dams, &c., *Held* bad for omitting the words "next," and "as of right." *Buel v. Ford*, 206.

VENUE.

*Demurrer.*]—*Held* that an objection to a venue as being local was ground of general demurrer. *Dance v. Burrows*, 172.

VERBAL.

*Agreement for purchase of land.*]—*See* COMMON COUNTS.

VERDICT.

*Amount of, governs costs between attorney and client.*]—*See* COSTS.

WAIVER.

*See* MORTGAGE.

*Of covenant to build.*]—*See* LEASE, 3,

WILL.

*Registry of deed by heir-at-law*

*prior to—Valuable consideration.*]—*Held* that the acceptance of a deed of land from the reversioner in fee did not of itself acknowledge any present right or interest in such reversioner, and that a conveyance by an heir-at-law for a nominal consideration, registered prior to a will, did not operate to cut out the will, a valuable consideration being required by the registry laws to take effect. *Wilkinson et ux. v. Conklin*, 211.

WITNESS.

*Competency of surety to be in an action against a sheriff.*]—*See* FALSE RETURN.

WOOD.

*Restriction of sale of, by by-law.*]—*See* BY-LAW, 2.













